BYU Law Review

Volume 1986 | Issue 3 Article 9

9-1-1986

The Problem of Mistake in Self-Defense

Gunter Stratenwerth

The Problem of Mistake in Self-Defense

*Günter Stratenwerth**

The question of how to handle the problem of putative self-defense has been one of the most controversial topics in German case law and doctrine for many years. Professor George Fletcher has recently provided us with a thoughtful and penetrating comparison between common law and continental thought that focuses on this problem, among others.[1] Since the concept of "putative self-defense" may be unfamiliar to American readers, at least under that label, Fletcher's definition of the concept may be helpful. As he states,

> [t]he phrase 'putative self-defense' refers to the problems that arise when someone reasonably believes that he is being attacked, but in fact is not, and uses force against a person who is not in fact an aggressor. The problem is whether in view of the actor's reasonable belief, the use of force will support a charge of battery or, if the victim dies, of homicide. The self-defense is called putative for it is not a case of real self-defense, but of force used against a putative aggressor.[2]

This Article attempts to provide a supplementary view of the issue from the perspective of German theory.

More than 20 years ago the venerable Karl Engisch described the German doctrinal discussion about putative justification as being "of downright scholastic refinement,"[3] and so it has remained. The few rules at the center of this controversy can be easily articulated. However, it is much more difficult, even without considering the more sophisticated arguments, to explain the motives behind the different positions.

---

* Dr. jur., Göttingen, 1950; Habil., Bonn, 1956; o. Prof., Erlangen, 1960; Basel, 1961.

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

2. *Id.* at 972.

3. Engisch, *Tatbestandsirrtum und Verbotsirrtum bei Rechtfertigungsgründen*, 70 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 566, 567 (1958).

I. Alternative Approaches to Putative Justification

This discussion requires a short account of the different doctrines involved in the German debate about putative justification. As Fletcher observes, both American and continental scholars agree that reasonable belief in justificatory facts precludes criminal liability.[4] They disagree perhaps in the way they reach this result—but that is not our concern here. German and American rules diverge in cases involving unreasonable mistake: mistakes about justificatory facts absent sufficient reason for that belief. Consider, for example, the case in which a policeman arresting a person mistakenly believes that he is going to be attacked by that person and therefore responds with reasonable force or, more precisely, with a degree of force that would be permissible under the assumed circumstances. If he had been paying more attention, the policeman could have known that there would be no attack at all. American lawyers would argue that the mistake is irrelevant and should have no influence on criminal liability for battery or homicide. German case law and literature, in contrast, generally suggest that a mistake of this sort, if not quite excusable, should at least affect the degree of punishment. The question is how and to what degree punishment should be mitigated. This is the analytical focus of this Article.

A. Treating Culpable Mistakes as Mistakes About the Definition

The German Criminal Code does not resolve the question. The Code purposely left the issue open for further consideration by the courts and criminal theorists. It provides two different patterns for handling culpable mistakes, and these are also the two possible solutions for putative self-defense. The first of these possibilities is found in section 16 of the German Criminal Code, which reads:

> Whoever commits a [criminal] act without being cognizant of a circumstance which is an element of the definition does not act intentionally. Liability for negligent perpetration of the act is not excluded.[5]

This rule reflects the simple and self-evident truth that if a

4. *See* Fletcher, *supra* note 1, at 971-80.

5. Strafgesetzbuch [StGB] § 16 (W. Ger.).

certain knowledge belongs to the criminal intent required for liability, then any lack of such knowledge precludes the criminal intent. There may still be, of course, liability for negligent behavior, but only if two conditions are fulfilled: First, that the code encompasses negligence as a form of liability for that offense; and, second, that the perpetrator actually is to blame for his mistake. This approach treats culpable mistakes about justificatory facts analogously to mistakes about the definition of the offense. The policeman in the above example could not be punished for intentional homicide or battery, but only for negligent or unintentional commission of such offenses.[6]

B. Treating Culpable Mistakes as Mistakes of Law

The other approach to the problem of unreasonable belief in situations of self-defense can be inferred from section 17 of the German Criminal Code, which deals with mistake about the legal prohibition:

> If, in the commission of the [criminal] act, the actor fails to perceive that he is doing wrong, the actor lacks culpability, if he could not have avoided this mistake. If he could have avoided the mistake, his punishment may be mitigated in accordance with section 49 paragraph 1.[7]

The second strategy for handling negligent, unreasonable mistakes about justificatory facts involves treating them as mistakes of law. Under this approach, the perpetrator would be convicted for the intentional commission of the offense, but his punishment could be considerably mitigated as provided in section 49 of the German Criminal Code.[8] Therefore, even if battery could not be negligently committed, the policeman would be liable for inflicting physical harm on the arrested person.

II. A Consideration of the Alternatives

The relative merits of these two alternatives have been, and still are, widely discussed in West Germany. For lawyers, I think the most natural approach to the problem is to consider its practical impact.

---

6. *Id.* Under the German Criminal Code, both homicide and battery can be committed negligently. *Id.*

7. *Id.* § 17.

8. *Id.* § 49.

A. Actual Consequences

Treating putative self-defense as a mistake about the elements of an offense may result in a failure to impose criminal liability for obviously culpable behavior. For this reason, Professor Fletcher has argued against the Model Penal Code's proposition that any good faith belief in justificatory facts should bar liability, unless the Code provides that the offense is subject to liability for negligent commission.[9] He remarks: "It is odd to recognize a complete defense in cases of unreasonable mistake simply because there is no intermediate offense of negligent commission."[10] Under German law, this objection is of little importance in cases of putative self-defense because the actor can usually be charged with negligent perpetration of the act. There are, however, other justifications, such as consent, "lesser evils," or governmental claims, which do create vexing gaps in criminal liability.

A second argument along the same lines is based on negligent offenses being subject to far lower sanctions than intentional crimes. A mistake about justificatory facts might be quite inexcusable, so that the lesser sanction appears to be inappropriately mild. However, this result does not seem to bother courts.

Ultimately, describing practical consequences under the respective theories does not resolve the dispute. Further arguments are clearly needed, particularly since self-defense is only one of many justificatory claims. The optimal approach to the controversy *should* be applicable to all other justificatory claims.

B. Are Elements of the Definition and Elements of Justification Analogous?

Whether a certain fact belongs among the elements of a crime's definition or merely affords a justification for the act sometimes depends on relatively arbitrary turns of legislative technique. This is especially true in determinations of a victim's consent. Consider an example discussed extensively by Fletcher: Is lack of consent in a rape case an element of the prohibited act, or is consent an element of justification? Although Fletcher argues that lack of consent is not necessary to condemn a forcible sexual act as rape, he has expressed doubts about treating

9. G. FLETCHER, RETHINKING CRIMINAL LAW 689-90 (1978).
10. *Id.* at 689.

consent merely as a basis for justification or exculpation.[11] Section 177 of the German Criminal Code defines rape as forcing a woman to submit to extramarital sexual intercourse.[12] The Code presupposes that a voluntarily compliant person cannot be forced. Thus, under the Code, lack of consent is undoubtedly an element of the definition. And, if consent is an element of the definition, then a mistake about consent would negate the intent required for rape.

On the other hand, if consent is merely a justification, the defendant would not be able to negate his intent if a mistake were made. This causes a paradox, because it would appear strange and inappropriate to a large majority of German criminal lawyers if the legal consequences of mistakenly assuming the consent of the victim were to depend on a distinction as subtle as that between elements of the definition and elements of justification. Consequently, a strong argument exists for treating mistakes about claims of justification analogously to mistakes about the definition. This result holds true for all justificatory claims. Naturally, this conclusion is not universally accepted. Supporters of the second German alternative would argue, as indeed Fletcher does, that there exists an essential difference between elements of the definition and elements of justification. This is the decisive point of the discussion. To frame it as a question: Does the fact that a person consciously and willingly performs the elements of an offense oblige him to be especially careful in assuming justificatory circumstances? A considerable number of German legal scholars answer in the affirmative. An act exhibiting the necessary elements of an offense, they say, is an unusual event, one outside the normal social order. Whoever intentionally commits such an act knows that he is impairing a legally protected interest. This should give him sufficient notice to examine the situation carefully before he acts. Justification appears, in other words, as an exception to the inherent wrongfulness of a transgression against a prohibitory norm. Hence, the actor cannot rely on justifying facts to the same extent as he can usually rely on the absence of incriminating facts. Only an excusable mistake can discharge him.

But is it necessarily true that conduct not within the reach of the criminal law is, so to speak, "innocent?" And, conversely,

---

11. *Id.* at 706-07.
12. StGB § 177.

is justifiable conduct which nominally violates the law "suspect"? Of course no one would dispute the difference between killing a fly and killing a human being in self-defense. However, this is an extreme comparison. The question requires closer examination. Many actions which are not legally reprehensible are not socially acceptable. This is the root of many of the arguments advanced in favor of disregarding mistakes about incriminating facts. For example, Professor Fletcher's *Rethinking Criminal Law* refers to *Regina v. Prince*,[13] where the fact that an act was wrongful in an informal, ethical or social sense appears to have been the basis of the decision to disregard a mistake of the perpetrator which otherwise would have precluded criminal liability. Within the context of German law, this argument would run as follows: Seducing a young girl is wrongful conduct. Therefore, the malefactor charged with an offense according to section 182 of the German Criminal Code for seducing a girl under 16 years could not claim a mistake about the age of his lover as long as he knew that she was *young*.[14]

No continental court or lawyer would openly make such an argument because knowledge of the girl's age is part of the legally required intent. The alleged wrongfulness of the conduct might have substantial influence on the credibility of the evidence regarding the mistaken belief, but it would have no substantive effect. This example should make clear that the performer of an act which does not violate the law may nevertheless have reason to be attentive to incriminating circumstances, in much the same way, for instance, as a person who is exercising a disciplinary privilege. This seems to be the point behind Fletcher's comment that "it would be implausible to treat nonconsent as well as force as necessary conditions for rendering the sexual act suspect."[15] Force alone makes it suspect.

However, just as acts which do not violate criminal law may not conform to social rules, acts which do violate criminal law may not be abnormal. Every policeman making an arrest nominally commits, according to German law, the offense of deprivation of liberty. Fortunately, in most cases this is justified by official duty. The same holds true for every teacher who detains a pupil after school, except that the teacher's action is justified by

---

13. 2 L.R.-Cr. Cas. Res. 154 (1875) (discussed in G. FLETCHER, *supra* note 9, at 723-31).

14. *See* StGB § 182.

15. G. FLETCHER, *supra* note 9, at 705.

his disciplinary privilege. By and large, acts which violate criminal laws, but which are justified under the given circumstances, do not suggest wrongfulness any more than many acts which are legally quite unimpeachable. Hence, it appears at least not inappropriate to follow the first alternative, namely handling mistakes about justifying circumstances as one would handle mistakes about elements of the definition, just as the German Supreme Court and a majority of theorists actually do.

C. Significance of the Actor's Good Will

The most fundamental difference between the two positions in this controversy lies in divergent appreciations of the significance of the actor's good will. Of course, the leading German doctrine does not equate mistaken belief in justificatory facts with actual justification. Nevertheless, it does suggest that the intention of a person mistakenly assuming a justifying situation is in conformity with the legal order, just as if this assumption were true. Viewed from the perspective of the symbolic function of inflicting public punishment as a corroboration of basic social rules, the fact that the actor's *intention* is in accordance with the legal order seems to be of decisive importance. It is not necessary, at least not to the same degree, to stigmatize a given act as blameworthy if it was not performed with unlawful intent. This point of view strengthens the case for analogizing between mistake about justifying circumstances and mistake about elements of the definition. Viewed from the outside, conduct may appear deviant unless the will of the actor is considered. If, however, as under common law, mistakes are taken into account only if they are reasonable, the external unlawfulness of the act is accentuated. This is true of the German minority position that mistakes about justificatory facts should be treated by analogy to mistakes of law. This suggests a more liberal conception of the criminal law which emphasizes the external inviolability of legally protected rights. The problem of putative self-defense seems to confront us with different patterns not only of legal thinking but also of legal philosophy.

D. Distinguishing Mistakes About Justificatory Facts from Mistakes About the Grounds of Justification

The German majority position that putative self-defense precludes a finding of the required criminal intent deserves fur-

ther discussion, particularly in light of the very difficult distinctions which result from this doctrine. The analogy to mistake about the definition concerns only mistakes about justificatory facts in the proper sense of the word, not other mistakes about grounds of justification, which are treated analogously to mistakes about the law. It is crucial to differentiate between these two types of mistakes, and of considerable practical importance to know where the line between them is drawn.

Particularly intricate questions arise in this context, even though the initial delineation is simple enough: Mistakes about justificatory claims which the law does not recognize, such as the assumption that the informed consent of a terminally ill patient justifies an act of mercy killing, can be totally disregarded. These are undoubtedly mistakes of law which have bearing only on the culpability of the actor. The next step is also basically clear: We must distinguish between the mistaken belief in justifying circumstances and the mistake about the justificatory reach of these circumstances. For example, the first kind of mistake exists if one believes that he is being attacked by an aggressor, whereas the second kind exists if one believes that deadly force is permissible to stop a petty thief.[16]

Juridical treatment of these distinctions can be very complicated. In 1952 the Bundesgerichtshof considered a case in which a man who was repairing the wooden floor of his house was attacked bare-handedly by his brother, who was known to be violent when drunk.[17] The man defended himself by hitting his brother's head violently with a hammer, killing him. In this case, a whole variety of mistakes could have come into play. For instance, the defendant, ignorant of his brother's intention, could have overestimated the seriousness of the attack. His mistake, as the court recognized, would be one concerning justifying facts. He thus acted in putative self-defense, just as if he had not been aware of the deadly force of the blow. On the other hand, because he was handicapped by a leg prosthesis, he might possibly have believed he was entitled to such a large degree of force in warding off a relatively severe bodily attack. This assumption seems more like a mistake of law. To make things worse, the two types of mistake could have been confused in his mind. I do not

16. *See* G. FLETCHER, *supra* note 9, at 684-85.

17. Judgment of July 1, 1952, Bundesgerichtshof, Senat [Bundesgerichtshof], W. Ger., 3 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 194.

envy the investigating officer who had to find out, by interrogating the accused, which kind of mistake he made and to what extent he was actually deceived. Moreover, the lower criminal court stated that the events transpired so quickly that the defendant probably thought nothing at all, or at least nothing distinct.[18] Under such circumstances only the rule that lack of evidence works to the benefit of the defendant (*in dubio pro reo*)[19] leads to a conclusion.

E. Distinguishing Putative Self-Defense from Mistake of Law

Another type of mistake disturbs those holding the German majority doctrine. An example may illustrate. Suppose that after a traffic accident one of the drivers tries to flee and the other attempts to restrain him. The first driver may mistakenly believe that a private person is not entitled to arrest him (he is so allowed under German law) and uses force to counter the supposedly wrongful attack. Is he acting in putative self-defense? Or is he blinded only by a mistake about the law? The answer is controversial. Some German theorists favor the classification of this belief as a mistake about justificatory facts. Other theorists, and a decision of the Bavarian High Court, disagree.[20] Although the controversy is perhaps easy to understand, the arguments supporting the different positions are not.

1. Mistake about the definition

A detailed analysis of this scenario requires that we first realize that this question is analogous to issues within the realm of mistake about the crime's definition. Many terms used by the law in describing a crime do not plainly denote facts. They also include elements of normative judgment concerning the legal or social meaning of certain facts. For example, larceny is defined as the taking of goods owned by another person. German courts have been required to determine whether old furniture left by the owner in front of his house for collection is still his property, or the property of the community or, because it was abandoned,

---

18. *Id.* at 195-96.

19. "In case of doubt the response is in favor of . . . the defendant." BALLENTINE'S LAW DICTIONARY 615 (3d ed. 1969).

20. Judgment of May 25, 1965, Oberstes Landesgericht Bayern, W. Ger., 18 Neue Juristische Wochenschrift [NJW] 1924 (1965).

the property of no one. People gathering such garbage for their own profit could mistakenly believe they were acting legally. They would not know they were taking the property of another person. Although this mistake would concern not the facts, but the law (i.e., private law), there is little question that it should be treated as negating the intent required for larceny.

2. *The social meaning of facts*

Generally speaking, criminal intent requires not only an awareness of the bare facts constituting an offense, but also knowledge of the legal or, at least, the social meaning of these facts. This point is very important. It means that the distinction between mistakes about the definition and mistakes about wrongfulness does not coincide at all with the old distinction between mistakes of fact and mistakes of law.[21] The difference between the two types of mistakes must be formulated in another way, corresponding to the contrast between mistakes about one or more single elements of the definition and mistakes about the wrongfulness of the act as a whole. German criminal law doctrine is unanimous in this respect.

However, the principle is one thing and its practical application is another. Difficulties arise especially when the statutory definition of an offense comprises a very general normative notion, such as "contrary to one's duty," as in the case of a lawyer giving counsel to both sides in a legal matter. Several issues arise: What about a lawyer who mistakenly believes that he is not violating the duties of his profession? Does his mistake negate the intent required for disloyalty toward a client? Or is this only a mistake about the wrongfulness of his conduct, which means a pure mistake of law? Understandably, opinions diverge. Some aspects of the doctrine would mandate handling the mistake of violating professional duties as a mistake about the definition. However, the courts, relying on other aspects of the doctrine, try to differentiate between mistakes about facts in their normative context, on the one hand, and mistakes about the wrongfulness of the act on the other. Although it is not possible to go into detail in this context, it will suffice to note that voluminous commentary on the German Criminal Code declares

---

21. *Cf.* G. FLETCHER, *supra* note 9, at 753.

hopeless all attempts at achieving clear distinctions in this respect.[22]

Returning to the hypothetical of two drivers in a traffic accident, the characterization of an attack as "wrongful," which under the statute justifies self-defense, is no less comprehensive than the notion of an act's being "contrary to one's duty." If this attribute of wrongfulness is treated as an element of the definition, then the first driver, in thwarting his arrest, is acting in putative self-defense: He mistakenly assumes circumstances connected with a particular normative meaning which would make his counterattack permissible. Consequently, he would not be liable for battery, but, at most, for negligently inflicting bodily harm upon another person. This is not the predominant theory, however. The majority position would incorporate within the epithet "wrongful" the manifold conditions under which the attack is considered unlawful. This leads to a distinction analogous to that discussed in connection with the violation of professional duties: Putative self-defense comes into question only if the actor mistakenly assumes a situation which would render the attack lawful, whereas a mistaken evaluation of the legal aspects of that attack would constitute a pure mistake of law. Hence, it follows that the driver, obviously not mistaken about the circumstances, but misjudging only their legal importance, would remain liable for intentionally injuring the other driver. At best, he could expect some mitigation of the punishment according to section 17 of the German Criminal Code.[23] These examples illustrate the intricate delineations unavoidably connected with treating putative self-defense in the same manner as mistake about the definition.

III. Determining the Optimal Approach

At this point we can summarize the specific difficulties arising from every step of the doctrinal analysis of mistakes about justifying facts under German law. The first step requires a determination of which of the types of mistake explicitly regulated in the German Criminal Code should govern the treatment of mistaken perception of justificatory circumstances.

The simplest solution seems to be the mistake of law ap-

22. E. Hübner, Strafgesetzbuch: Leipziger Kommentar § 356, Marginal No. 135 (10th ed. 1980).

23. StGB § 17.

proach. But this solution requires that an essential difference between the elements constituting an offense and the elements of justification be shown. Moreover, precise criteria must be developed for thoroughly distinguishing both. German courts and most theorists support the opposite solution, which equates justificatory mistakes with mistakes which preclude the required criminal intent. This in turn compels a differentiation between mistakes about a justifying situation and mistakes about claims of justification which represent, in every case, only mistakes of law. If this is not done according to the obsolete differentiation between mistakes of fact and mistakes of law, it is necessary to adopt more recently postulated distinctions between mistakes about the elements of the definition and mistakes about the wrongfulness of the act, which are likewise difficult and controversial. As a result, the German debate about putative self-defense and other similar mistakes appears not to provide an attractive solution for American lawmakers.

Nevertheless, the problem of dealing appropriately with mistakes about justificatory facts under American criminal law is arguably not much different than dealing with it in the German system. Both German and American legal systems must distinguish between mistakes negating the required intent and mistakes merely about justificatory claims. Consider again the example of a mistake about a woman's consent in connection with rape. If these two types of mistakes are treated differently, that is if the mistake about justifying facts is considered only when the actor is free of fault, then one must still explain whether and why it is just to do so. This concern arises in cases where the mistake neither fully meets the standard of reasonableness nor is totally negligible. How can it be plausible that mistake about elements of the definition negates the criminal intent, but mistake about the elements of justification does not? Is it fair that the latter mistake, although not entirely excusable, should have no influence whatsoever on criminal liability? Only an affirmative answer avoids the difficult distinctions discussed in this paper. Otherwise, one cannot escape the complications that keep the advocates of the German majority position busy.

A. In Defense of the German Majority Position

As a proponent of the German majority position of equating mistakes about justificatory facts with mistakes about the defini-

tion of the crime,[24] I would like to advance, in the final section of my paper, some additional arguments for that approach, in the hopes that these may perhaps serve as a starting point for a final comparison of the American and German methods of analyzing these criminal law issues. The most basic reason for equating mistakes about justificatory circumstances with mistakes about the definition of the crime is the strong feeling that it is grossly unjust to treat a person acting in putative self-defense as an intentional wrongdoer. There is an essential difference between mistakes about the situation and mistakes about the norms sanctioned by the criminal law. Anyone may at any time make a mistake about the circumstances surrounding him. Such a mistake says very little, if anything, about that person's attitude toward the legal order. Even if he negligently misconceives important facts, he is still, at least in principle, a law-abiding citizen. This is not true of a mistake concerning the scope of freedom a person has in relation to other people or to the community as a whole. In principle, this form of misjudgment is obviously less excusable, since it suggests a more radical social deviance. Thus, it seems appropriate to treat the two types of mistakes according to different rules, as is done under both common and continental law. It seems logically inconsistent to equate a mistake about justificatory facts, undoubtedly belonging to the category of mistakes about the situation, with a mistake of law.

B. Conclusions About the German and American Approaches

Assuming that this is the decisive reason for adhering to the German majority position, some tentative conclusions can be drawn about the deeper methodological differences between the American and German approach to the questions of criminal liability. Earlier in this Article I suggested that the common law way of handling mistakes about justificatory facts accentuates the external unlawfulness of the act, which reflects a more liberal conception of criminal law.[25] Some additional comments are now appropriate. Focusing on the attitude of the actor toward the law is merely seeing the situation through the eyes of the supposed perpetrator. It emphasizes his point of view and not

24. *See* G. STRATENWERTH, STRAFRECHT: ALLGEMEINER TEIL I 52-54 (3d ed. 1981).
25. *See supra* notes 13-15 and accompanying text.

that of the victim. This reveals a pronounced moralistic or ethical approach to the problems of criminal accountability. In contrast, taking mistakes into account only if they are reasonable emphasizes another side of the social conflict. It stresses the legally protected interests of the injured person and favors more formalized rules of criminal liability. Seemingly, many of the differences between our two legal orders could be reduced to these alternative approaches. This is also true of the different structures of criminal procedure. In continental Europe the judge must determine the type and degree of the offender's culpability. In the United States, on the other hand, the judge has the role of referee between litigating adversaries. If an offense can be proven, then liability is more readily assigned than under continental law.

This realization touches on what may be the most basic contrast between the patterns of legal theory in the two countries. German criminal theory attempts to insert the details of accountability into an all-embracing system of syllogisms free of any contradictions. This accounts for the highly abstract and sometimes unrealistic fashion of its theoretical discussions. This type of reasoning has distinct merits. It compels one to really think out legal problems. By contrast, the American method seems to concentrate more on the pragmatic aspects of the procedural outcome. Although this approach avoids theoretical reflections too far removed from reality, it may occasionally overlook systematic correlations essential to fair judgment. Accordingly, I emphatically support dialogue concerning questions of criminal liability, whether putative self-defense or others, between common law and continental lawyers. It may help us all.