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Mens Rea in Corpore Reo: An Exploration of the Rapists Charter

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I. *Context*

The issue of rape has long been at the forefront of the feminist movement. Legal doctrine and legal procedure relevant to rape have been strongly attacked by a variety of critics.[1] The most obvious recent trend has been a movement from the traditional liberal concern with the protection of the accused from unjustified conviction, to victim-oriented efforts which are designed to ensure that the number of guilty offenders who evade responsibility for rape is reduced as much as possible.[2] The bases of calls for victim orientation have ranged from the view, most eloquently expressed by Susan Brownmiller, that the fact of rape is a pattern of conduct by which all men keep all women in a state of fearful subjection,[3] to the view that present rape laws, suitable amended, will provide as much protection from rape as can reasonably be expected.[4]

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1. See, for example, Chappell, Geis and Geis, eds., *Forcible Rape: The Crime, the Victim, and the Offender* (Columbia U.P., 1977); Scutt, ed., *Rape Law Reform* (Australian Institute of Criminology, 1980); Le Grand, *Rape and Rape Laws: Sexism in Society and Law* (1973), 61 Calif. L. R. 919; Note, *Recent Statutory Developments in the Definition of Forcible Rape* (1975), 61 Va. L.R. 1500; Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom* (1977), 77 Col. L.R. 1; Mitra, *For she has no right or power to refuse her consent* (1979) Crim. L.R. 558; Schwartz and Clear, *Towards a New Law on Rape* (1980), 26 Crime and Delinq. 129; Temkin, *Towards a Modern Law of Rape* (1982), 45 Mod. L.R. 399; Kneedler, *Sexual Assault Law Reform in Virginia — A Legislative History* (1982), 68 Va. L.R. 459.

2. Specific reference to this trend is made, for example, in Note, *Recent Proposals in the Criminal Law of Rape: Significant Reform or Semantic Change* (1979), 17 Osgoode Hall L.J. 445 at 445, and Kneedler, *id.* 461.

3. See, for example, Brownmiller, *Against Our Will: Men, Women and Rape* (Simon and Schuster, 1975) at 15. But see also Schwedinger and Schwedinger, *Rape, the Law, and Private Property* (1982), 28 Crime and Delinq. 271. See also French, *The Women's Room* (Sphere Books, 1977) at 557 ff.

4. See, for example, Toner, *The Facts of Rape* (second edition, Arrow Books, 1982) at 265; Dahlitz, *A Case for Legislative Reversal of The House of Lords Decision in Director of Public Prosecutions* v. *Morgan* (W.E.L. 1976); Schwartz and Clear, *supra*, note 1.

The current trends in the argument about rape and the law have led the radical feminist to an uncomfortable ideology. On the one hand, she sees that current law, developed in and largely determined by a male-oriented society, has severe flaws which result in the unjustified acquittal of accused males.[5] This feeling is grounded in the female experience, for despite all the moves to render rape laws sexually neutral, rape remains a crime of violence that is committed largely by males against females.[6] As a result, the feminist feels personally victimized when accused males are acquitted on the basis of facts which, whether they constitute rape in law or not, she feels ought to lead to his punishment. On the other hand, the radical feminist is, after all, a radical; she feels uncomfortable about the efficacy and ideological utility of both the conventional criminal process and retributivist theory. She is even more uncomfortable with her strange alliance with those conservative elements of society whose victim orientation is part of a larger campaign to cure the "crime problem" by the introduction of more police, more prisons, harsher punishment, and other retributivist strategies. Fundamentally, the feminist is in the bind of the person who feels like a victim and yet wishes to deny it. For example, should she who works for gun control encourage women to carry guns as protection against rape?[7]

The movement for the victim-oriented reform of rape laws has been complicated by at least three factors. First, it is commonly held that, if rape is not the most severely under-reported major crime, its efficacy is certainly badly hampered by the reluctance of victims to report rapes. This reluctance may be due to a variety of reasons, some of which are related to the operation of the criminal law and some of which are related to social and moral pressures.[8] Both sets of reasons are unique to rape. It follows that any reform that is based, at least in part, on utilitarianism must pay careful attention to the everpresent problem of under-reporting.[9] Second, the breadth and complexity of the issues has generalized and dissipated the focus of reform; from the victim's point

5. See, for example, the analysis provided by Le Grand, *supra,* note 1 and Schwedinger and Schwedinger, *supra,* note 3.
6. By, for example, legislation to remove the restriction of rape to offences committed by males upon females.
7. See, for example, Blakely, *Would You Feel Safer Carrying A Gun?* (May, 1982), Ms. at 15. Feminists feel the same ideological schizophrenia about rape and pornography; see Brownmiller, *supra,* note 3 at 394-396.
8. See examples cited in the material cited, *supra.*
9. See, for example, Dahlitz, *supra,* note 4 at 21.

of view, there is still much that needs to be changed. Attention must be paid to all aspects of the process — informal police procedures, formal court procedure, the rules of evidence, doctrinal criminal law, and sentencing.[10] Third, victim orientation essentially involves an attempt to replace one set of perspectives with another — that is, to set a new standard of culpability.[11] This may be expressed as a demand for changes in the definition of rape. For example, it has been claimed that the establishment of penetration, at present the most obvious distinction, if indeed there is any, between the concepts of rape and sexual harassment, should be de-emphasized. The demand for change may also be expressed in other ways, and one of these, the notion of requisite culpability, is the main theme of this paper.

The mental element of the crime of rape, which had hitherto remained obscure, suddenly achieved prominence in 1975. The immediate cause was the decision of the House of Lords in *Morgan*.[12] An impetus was the nature of the now famous factual situation, often described as bizarre, that was involved in the prosecution.[13] Essentially, those accused of rape alleged that, although the victim of the assault had screamed for help and struggled to get away, they believed that she consented to have sexual intercourse with them. The accused and the husband of the victim had been drinking together. The husband told the accused, or so they alleged, that his wife was "kinky" and would welcome forcible sexual intercourse with strangers, and that struggles would only indicate enjoyment. The point before the House of Lords, and the point of this paper, is a very narrow one. It may be assumed that, the Crown having established all of the external requirements of the crime, the accused had committed the actus reus of rape; that is, the accused had sexual intercourse with another person who did not, in fact, consent to that act. The accused then said, "I was unaware that she did not consent." The problem is to determine the circumstances in which that belief will exculpate the accused. In *Morgan,* the trial judge directed the jury as follows:

> The prosecution have to prove . . . not merely that he intended to have intercourse with her but that he intended to have intercourse

10. See the material cited, *supra,* notes 1 to 4.

11. This is, again, a common theme. Perhaps a most arresting example is Russell, *The Politics of Rape: The Victim's Perspective* (Stein & Day, 1975).

12. [1976] A.C. 182, [1975] 2 A11 E.R. 8, [1975] 2 All E.R. 347, [1975] 2 W.L.R. 913, (H.L.).

13. By, for example, *Report of The Advisory Groups on The Law of Rape* (The Heilbron Committee) Comnd. 6352, (1975), para. 26, hereafter referred to as "Heilbron".

> without her consent. Therefore if the defendant believed or may have believed that Mrs. Morgan consented to him having sexual intercourse with her, then there would be no such intent in his mind and he would not be guilty of the offence of rape, but such a belief must be honestly held by the defendant in the first place . . . And, secondly, his belief must be a reasonable belief; such a belief as a reasonable man would entertain if he applied his mind and thought about the matter.[14]

The House of Lords held that the direction was erroneous. A majority decided that, if the accused honestly,[15] though mistakenly, believed that the victim was consenting to the act of intercourse, then the accused must be acquitted, whether or not his belief was based on reasonable grounds.[16] The decision attracted a storm of protest, and there were numerous calls for legislation to reverse it.[17] Many people thought it outrageous that an accused who had otherwise committed rape should escape prosecution if he could claim that he believed, reasonably, that the victim was consenting, however unreasonable that belief may have been in the circumstances. Lord Simon, dissenting in *Morgan,* expressed his sentiment with some force, saying:

> It would hardly seem just to fob off a victim of a savage assault with such comfort as he could derive from knowing that his injury was caused by a belief, however absurd, that he was about to attack the accused. A respectable woman who has been ravished would hardly feel that she was vindicated by being told that her assailant must go unpunished because he believed, quite unreasonably, that she was consenting to sexual intercourse with him.[18]

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14. *D.P.P.* v. *Morgan,* [1975] 2 All E.R. 347 at 356.
15. The word "honest" is, of course, a redundancy commonly used as a matter of emphasis. See, for example, Glanville Williams, *Textbook of Criminal Law* (Stevens, 1978) at 98.
16. The majority was composed of Lords Hailsham, Cross, and Fraser. Lords Simon and Edmund Davies dissented. The dissent of Lord Simon is examined, *infra,* notes 199-209. The dissent of Lord Edmund Davies is noted, *infra,* at notes 36-37.
17. See accounts of public reaction in Toner, *supra,* note 4 at 134-139, who comments at 137: "After so many years of unjust decisions it was perhaps ironic that a just decision on rape should tap the vast reservoir of outrage and indignation." See also Cross, *Centenary Reflections on Prince's Case* (1975), 91 L.Q.R. 540 at 551-2 and, *supra,* note 2 at 454. Examples of the reaction at an academic level include Dahlitz, *supra,* note 4 and Pickard, *Culpable Mistakes and Rape* (1980), 30 U.T.L.J. 75.
18. [1975] 2 All E.R. 347 at 367. Sellers comments acidly and correctly that this view begs the whole question: Sellers, *Mens Rea and the Judicial Approach to "Bad Excuses" in the Criminal Law* (1978), 41 Mod. L.R. 245 at 247 n. 15.

This paper concerns the question of whether the decision in *Morgan* was, in principle, correct. That seemingly simple question turns out to involve many other very difficult matters of law and policy.

II. *A Preliminary Investigation of Mens Rea and Culpability*

It is traditional to analyze a criminal offence in terms of actus reus and mens rea.[19] The term "actus reus" is used to refer to the external elements of a crime, and the actus reus of rape varies from jurisdiction to jurisdiction. For the sake of argument, it may be described as sexual intercourse that occurs with another person and without the consent of that other person.[20] It is not the purpose of this paper to deal with questions such as whether husbands should be immune from prosecution for the rape of their wives,[21] whether rape should extend to cases in which consent has been procured by fraud,[22] or whether rape should be redefined as varying degrees of sexual assault.[23] In the cases under discussion, which include *Morgan,* let it be assumed that the actus reus of rape, whatever it may be in the jurisdiction in which it occurred, has been established against the accused. The term "mens rea" may be used to refer to any requirement of culpability. It is exasperatingly fluid and defies definition.[24] Courts and commentators

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19. Arguments rage constantly concerning whether or not the distinction is theoretically defensible, and if so, what form it should take. See, for example, Packer, *The Limits of the Criminal Sanction* (Standford U.P., 1968) at 106; Fletcher, *Rethinking Criminal Law* (Little, Brown, 1978) at 395-400; Howard, *Criminal Law* (Law Book Company, fourth ed., 1982), at 9-12. Recent exploration of marginal cases includes Lynch, *The Mental Element In The Actus Reus* (1982), 98 L.Q.R. 109 and *Miller,* [1982] 2 All E.R. 386 (C.A.).

20. R.S.C., 1970, c. C-34, s.143. Key variations on the basic formula include the questions of whether or not the definition of the crime of rape should include only male perpetrators and female victims, and whether the definition should be limited to genital contact or should include the use of nongenital weapons and the abuse of nongenital areas.

21. See, for example, Scutt, *Consent in Rape: The Problem of the Marriage Contract* (1977), 3 Monash U.L.R. 255; McFayden, *Interspousal Rape: The Need for Law Reform,* in Eeckelaar and Katz, eds., *Family Violence: An International and Interdisciplinary Study* (Butterworth, 1978) at 196; Sallman, *Rape in Marriage and the South Australian Law,* in Scutt, *supra,* note 1 at 79; Freeman, *But if you can't rape your wife, whom can you rape? j*$1981] Fam. L.Q.L.

22. See, for example, Pomerant, *Consent fraudulently obtained in relation to indecent assault* (1967), 2 C.R.N.S. 384; McCann, *The Nature and Quality of the Act: A Re-Evaluation* (1968-9), 3 Ott. L.R. 340; *Harms* (1943), 81 C.C.C.4, (Sask. C.A.); Papadimitropoulos (1957) 98 C.L.R. 249; Scutt, *Fraud and Consent in Rape: Comprehension of the Nature and Character of the Act and Its Moral Implications* (1975-6), 18 Crim. L.Q. 312.

23. See, for example, Schwartz and Clear, *supra,* note 1.

24. The classic statement is that of Stephen J. in *Tolson* (1889), 23 Q.B.D. 168.

use a variety of terms, variously defined, which either display a fine disregard of common precision or are precise to the point of obsession.[25] Since the decision of the Supreme Court of Canada in *Sault Ste. Marie*,[26] Canadian criminal offences must fall into one of three categories. Those categories are:

> Category One: offences which require proof by the Crown of some state of mind of the accused, usually intention, knowledge, or recklessness;
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> Category Two: offences which do not require proof of a state of mind of the accused but which permit the accused to escape if he or she reasonably believed in a mistaken state of facts which, if true, would render the behaviour in question innocent, or if he or she took all reasonable steps to avoid the criminal event;
>
> Category Three: offences which result in a finding of guilt upon proof that the accused engaged in the prohibited behaviour without any proof of culpability.

For the sake of convenience, rather than precision, offences which fall into the first category may be called mens rea offences, those offences which fall into the second category may be called offences of strict liability, and those which fall into the third may be called offences of absolute liability. Such an analysis is too general, for the crucial enquiry may centre upon any given element of the offence in question. For example, consider the offence of unlawful sexual intercourse which provides that every male person who has sexual intercourse with a female person who is not his wife and who is under the age of fourteen years is guilty of a serious offence.[27] If random and arbitrary silliness is

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25. See, for example, Stuart, *The Need to Codify Clear, Realistic and Honest Measures of Mens Rea and Negligence* (1972-3), 15 Crim.L.Q. 160; Treiman, *Recklessness and the Model Penal Code* (1982), 9 Am. J. Crim. L. 281 at 284; see also the gyrations of three judges determined to achieve the same result, all by different means, in *Police* v. *Creedon*, [1976] 1 N.Z.L.R. 571, (C.A.), and the unreported lament of Nader J. of the Northern Territory Supreme Court, who said that ". . . if one attempts to define with philosophic precision such basic concepts as knowledge and belief one quickly descends into a quagmire of semantics losing touch with reality." *Anderson* v. *Lynch*, No. 331 of 1982.

26. [1978] 2 S.C.R. 1299, 40 C.C.C.(2d) 353 at 373-374, 85 D.L.R. (3d) 161, 3 C.R. (3d) 30, 21 N.R. 295. The decision was presaged at least as early as *Lock* (1974), 18 C.C.C. (2d) 477, (Ont. C.A.).

27. *Criminal Code*, R.S.C. 1970, c. C-34, s.146. Such nonsensical decisions as *Baptiste* (1981), 25 C.R. (3d) 252, (B.C.S.C.) reveal that the policy arguments in favour of such legislative rigidity are, at best, misconceived and, at worst, inhuman. Better compromises focus upon the more revealing indicators of the relationship between the male and the ex hypothesi consenting female; see, for example, Criminal Law and Penal Methods Reform Committee of South Australia,

ignored, such as restriction of the roles of offender and victim to certain sexes, then it may be said that the offence consists of three criteria of liability: the act of sexual intercourse, the circumstance of non-marital status, and the circumstance of the age of the victim. As the Criminal Code provides that the belief of the accused as to the age of the victim has no legal relevance, it may be said to be an absolute liability offence if this element is examined. But suppose that the accused believes that the female in question is his wife. It is possible that the law will hold that such a belief will exculpate the person who holds it and it is more likely if the belief is held to be reasonable. In short, it is possible for any given offence to contain elements which fall into any of the three categories outlined above.[28] Therefore, in any inquiry into the culpability requirements of a given offence, it is of first importance to isolate the element in question. *Morgan* concerned the culpability requirement of the element of consent. That is hardly surprising, for, odd cases of mistake concerning such matters as spousal status aside, the consent element raises the only culpability question of any importance in the crime of rape. It may be possible to imagine a case in which an act of sexual intercourse took place, and in which the accused is able to claim convincingly that he or she did not know that the act of sexual intercourse was taking place, but that must be a rare case indeed.[29]

The usual test for discrimination as to culpability in statutory offences is some variation on the test adumbrated in *Sherras* v. *De Rutzen*,[30] which, in essence, states that there is a presumption in favour of the requirement of mens rea[31] but that this presumption may be rebutted by the properly interpreted effect of the words and the subject

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Special Report: Rape And Other Sexual Offences (Mitchell Committee), (S.A. Govt. Printer, 1976) at 19-22, hereinafter referred to as "Mitchell".

28. See the remarkable decision in *McPherson, Farrell and Kajal*, [1980] Crim. L.R. 654. See also Treiman, *supra*, note 25 at 291-292.

29. See, for example, Pickard, *supra*, note 17 at 76; *Ladue*, [1965] 4 C.C.C. 264, 45 C.R. 287, 51 W.W.R. 175, (Y.T.C.A.); *Lupien*, [1970] 2 C.C.C. 193, (S.C.C.); *Ingram*, [1972] Tas. S.R. 250 at 263.

30. [1895] 1 Q.B. 918. Approved in *Beaver*, [1957] S.C.R. 531, 118 C.C.C. 129, 26 C.R. 193; *King*, [1962] S.C.R. 746, 38 C.R. 52; 35 D.L.R. (2d) 386; *Pierce Fisheries Ltd.*, [1971] S.C.R., [1970] 5 C.C.C. 193, 12 C.R.N.S. 272, 12 D.L.R. (3d) 591.

31. *Id.*, at 921-922. The exceptions are:

(a) acts which are not criminal in any real sense, but are acts prohibited under penalty and in the public interest;

(b) public nuisance;

(c) acts which are a summary mode of enforcing a civil right.

Rape is not one of these exceptions.

matter of the offence.[32] That is essentially a specialized variation on the so-called general mischief rule of interpretation. It is invariably a matter of expedient inference, and has resulted in a wide variety of mutually contradictory decisions and comments.[33] It is also clear from *Sherras* v. *De Rutzen* and other traditional sources that crimes defined at common law fall into category one and require proof of mens rea as to all elements of the offence in question.[34]

But in Canada and in many other common law based jurisdictions, rape has become a statutory offence by codification and, hence, should be subject to the words and subject matter test. Moreover, something has been made of the fact that Lord Cross, a member of the bare majority in *Morgan,* stated that his decision may well have been different had the English statute in question said "sexual intercourse with a woman without her consent" rather than merely "rape".[35] This is, however, a distinction where there is no difference. Why should it make any difference whether the same words define an offence at common law or in a statute? If the majorities game must be played at this level, what can be made of the fact that a dissenter, Lord Edmund Davies, found the majority result correct in principle but felt constrained by his view of precedent to disagree in the result?[36] Moreover, even if the game of what might have been is played, why then pay attention to the formalities of majorities and the *ratio* when the proper question is the point of principle? One Law Lord here or there is hardly the point unless one subsumes the matter of principle to the forms of legal authority. Once it is decided that the policy is to be explored, then common law or statute, majorities or minorities, stand only for

32. There is an extremely impressive array of authority for this proposition. See Mewett and Manning, *Criminal Law* (Butterworths, 1978) at 214 ff.

33. See, for example, the particularly trenchant comments of Devlin, *Samples of Law Making* (O.U.P., 1962) at 71; Weiler, *The Supreme Court of Canada and the Doctrine of Mens Rea* (1971), 49 Can. B.R. 280 at 315; *R.* v. *Turnbull* (1943), 44 S.R. (N.S.W.) 108 at 110.

34. One of the few possible common law exceptions to the rule of mens rea for common law crimes is seen in *R.* v. *Lemon; R.* v. *Gay News Ltd.*, [1979] 1 All E.R. 898 (H.L.).

35. [1975] 2 All E.R. 347 at 351-352. The desperate point is made by Pickard, *supra,* note 17 at 92, citing also the dissenting judgment of Lambert J.A. in *Pappajohn* (1973), 5 C.R. (3d) 193 at 208 (B.C.C.A.). The argument was rejected — correctly, it is submitted — by Dickson J. on appeal: *Pappajohn*, cited *infra,* at note 45, 52 C.C.C. (2d) 481 at 487.

36. [1975] 2 All E.R. 347 at 379: "[H]ad I felt free to do so I would have acceded to the invitation . . . that we 'should decide that a mistake of a relevant fact is a defence if the mistake was honest and genuine, even if it was also unreasonable'."

what they are and not for what they represent.

First principles dictate that the consent element of rape requires some form of culpability. No one has argued, let alone with conviction, that absolute liability ought to attach to the matter of consent. Given the improbability of intercourse by accident, such a course would convert an extremely serious crime to one with all the moral content of a parking offence.[37] Consent is the element which separates a relationship of mutual pleasure from violence and it exists solely in the minds of the participants.[38] Absolute responsibility as to the element of consent would place its relevance solely in the mind of the victim, who comprises only one half of the interaction.[39] The reactions and perceptions of the other part of the relationship would become irrelevant. The class of luckless victims would be randomly expanded.[40] The offences which contain significant elements of absolute liability are almost invariably characterized as minor, public welfare, regulatory offences.[41] The law displays a tendency to extend the exceptions to more serious offences, such as widespread toxic pollution, but it is inconceivable that the consent element of rape fits the description.

The real argument centres on the difference between the mens rea category and the strict liability category. In short, the belief of the accused regarding the victim's consent must be relevant; the only question is whether it falls into the category known as mens rea. The answer of the courts has been largely in favour of the mens rea

37. The absolute liability proposition is described by Glanville Williams as "an extraordinary proposition" (*supra*, note 15 at 101) and by Chambers J. as reducing the mental element of rape to "microscopic proportions" (*supra*, note 29 at 263).

38. See Brownmiller, *supra*, note 3 at 384, in which it is stated that "rape is the only form of violent criminal assault in which the physical act accomplished by the offender . . . is an act which may, under other circumstances, be desirable to the victim."

39. See Note, *supra*, note 2 at 456-457 for argument that considerations of sexual equality and autonomy preclude absolute or, indeed, strict liability.

40. The classic statement is that of the Privy Council in *Lim Chin Aik* v. *The Queen*, [1963] A.C. 160 at 174.

41. There is a wealth of authority for this proposition. Some examples are Brett, *Strict Responsibility: Possible Solutions* (1974), 34 Mod. L.R. 417; Hutchinson, *Saulte Ste. Marie, Mens Rea and the Halfway House: Public Welfare Offences Get a Home of Their Own* (1979), 17 Osgoode Hall L.J. 415, esp. at 425-426; Erlinder *Mens Rea, Due Process, and the Supreme Court: Toward a Constitutional Doctrine of Substantive Criminal Law* (1981), 9 Am J. Crim. L. 163, esp. at 168-170, 189-190; *Warner* v. *M.P.C.*, [1969] 2 A.C. 256 at 276, [1968] 2 All E.R. 356, [1968] 2 W.L.R. 1303, 52 Cr. App. R. 373; *Saulte Ste. Marie*, 40 C.C.C. (2d) 353 at 362-363.

classification and against the requirement of reasonableness. This view, known as the subjectivist view, has prevailed in England,[42] South Australia,[43] Victoria,[44] and, of course, in Canada.[45] The requirement of reasonableness has prevailed in Western Australia,[46] Tasmania,[47] and New South Wales,[48] but the latter state subsequently accepted the English decision in *Morgan*.[49] This paper concerns whether or not that majority is right in principle.

III. *Variations on the Meaning of Culpability*

(a) *The Objectivist Position*

(i) *General History*

The point of the objectivist position is that, in cases where the accused is found to have had sexual intercourse with another person without the consent of that other person but where he alleges that he *believed* the other person to be consenting, the belief *must* be reasonable if it is to exculpate the accused. In short, the argument holds that the element of consent attracts strict liability.

Naturally enough, attention has been focused almost entirely upon the external, objective character of the requirement of reasonableness, and upon the proposition that an accused who believes that the other person is consenting will, nonetheless, be convicted if a reasonable person would have known that the other person did not consent. With regard to the historical development of the standards of culpability, strict liability arose as a response to the inflexible choice imposed by the other two categories (mens rea and absolute liability offences) on the interpretation of statutory offences. Once it had been decided that some of the burgeoning

42. *Morgan, supra,* note 12, confirmed by the Heilbron Committee, *supra,* note 13, and then by legislation: *Sexual Offences (Amendment) Act,* 1976 c. 82.
43. *R.* v. *Brown* (1975), 10 S.A.S.R. 139, confirmed by the Mitchell Committee, *supra,* note 27 and then by legislation: *Criminal Law Consolidation Act Amendment Act,* No. 83 of 176.
44. *R.* v *Hornbuckle,* [1945] V.L.R. 281; *R.* v. *Flannery,* [1969] V.R. 31; *R.* v. *Maes,* [1975] V.R. 541.
45. *Pappajohn* v. *The Queen,* [1980] 2 S.C.R. 120, 52 C.C.C. (2d) 481, 111 D.L.R. (3d) 1, 14 C.R. (3d) 243, [1980] 4 W.W.R. 387, 32 N.R. 104.
46. *Attorney-General's Reference No. 1,* [1979] W.A.R. 45.
47. *R.* v. *Snow,* [1962] Tas. S.R. 271; *R.* v. *Bell,* [1972] Tas. S.R. 127; *R.* v. *Ingram, supra,* note 29.
48. *R.* v. *Sperotto,* [1970] 1 N.S.W.R. 502, 71 S.R. (N.S.W.) 334. See also *Bourke* (1970) 91 W.N. 793.
49. *R.* v. *McEwan,* [1979] 2 N.S.W. L.R. 926, and *Crimes (Sexual Assault) Amendment Act,* No. 42 of 1981.

regulatory offences of the nineteenth century imposed criminal responsibility without any reference to culpability, courts were faced with a choice between the full and arguably onerous panoply of common law mens rea or the guilt of the accused without regard for whether or not that person knew or should have known that what he or she was doing was wrong.[50] There was some early experimentation with a compromise standard, notably in bigamy cases,[51] but the effort to compromise first flowered in the Australian High Court.[52] In *Proudman* v. *Dayman,* Dixon J. held that some statutes imposed neither absolute liability nor mens rea. These intermediate cases permitted the accused to escape if he or she showed an honest and reasonable belief which, if truly held, would have rendered the behaviour of the accused innocent.[53] This compromise differed from the common law idea of mens rea in three ways: the mistake had to be reasonable; it had to, in fact, be a mistake (that is, the accused must have adverted to the matter at issue); and some burden of proof was placed upon the accused.

(ii) *The Burden of Proof*

While Canadian law had to wait for *Sault Ste. Marie,*[54] Australian case law, subsequent to the first attempts at a defence of mistake, developed the interpretation of the differences listed above. So far as the burden of proof was concerned, it was assumed for many years that the accused must show the defence of reasonable mistake

50. See, for example, the early decisions in *R.* v. *Woodrow* (1846), 15 M. & W. 404, 153 E.R. 907; *R.* v. *Stephens* (1866), L.R. 1 Q.B. 702; *Cundy* v. *LeCoq* (1884), 13 Q.B.D. 207.

51. Notably *Tolson, supra,* note 24; *Thomas* (1937), 59 C.L.R. 279; *King,* [1946] 1 Q.B. 285; *Gould,* [1968] 2 Q.B. 65. See also, on the general principle, *Saulte Ste. Marie,* 40 C.C.C. (2d) 353 at 364-365. The general pattern qua bigamy was also present in the United States. An example is *Commonwealth* v. *Mash* (1844), 7 Metc. 472, (Mass.).

52. Notable early examples are *Maher* v. *Musson* (1934), 52 C.L.R. 100; *Thomas, ibid; Proudman* v. *Dayman* (1941), 67 C.L.R. 536; *Reynhoudt* (1962), 107 C.L.R. 381. There is a vast literature on these developments. Classic examples are Sayre, *Public Welfare Offences* (1933), 33 Col. L.R. 55; Howard, *Strict Responsibility in the High Court of Australia* (1960), 76 L.Q.R. 547; Perkins, *Civil Offense* (1952), 100 U. Pa. L.R. 832. See also the excellent contributions by Hutchinson, *supra,* note 41 and Brett, *supra,* note 41.

53. *Proudman* v. *Dayman, id.* at 538, 541.

54. Earlier Canadian decisions of a representative nature are discussed by Mewett and Manning, *supra,* note 32 at 132-135, and in *Saulte Ste. Marie,* 40 C.C.C. (2d) 353 at 367-373.

on the balance of probabilities.[55] The House of Lords refused to adopt the compromise as a matter of principle because it felt constrained by the "golden thread" of *Woolmington* to hold that the burden of proof in criminal cases must rest upon the Crown,[56] and, as a result, it invented compromise solutions of its own in such cases as *Warner*. These individual compromises are distinguished by their incomprehensibility.[57] In 1973, the Supreme Court of South Australia reviewed the state of the art, and held by a majority that the burden on the accused was merely to bring forward sufficient evidence to raise a reasonable doubt on the matter.[58] Thereafter, the burden shifted to the Crown to negate the defence beyond a reasonable doubt. Although the South Australian position has received some support in the High Court,[59] the issue of the burden of proof is still in a state of flux.

The position in Canada would appear to be that the defendant bears the onus on the balance of probabilities; if the matter is evenly balanced, the accused will be convicted.[60] It is probable that this result is based, at least in part, upon a lack of information as to the current Australian position.[61] In the present context, it is also vital to

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55. See, for example, conflict between Professors Brett and Howard, *supra*, note 41; Howard, *supra*, note 52, and Howard, *Strict Responsibility* (Sweet and Maxwell, 1963) at 105-109. See also *R.* v. *Strawbridge*, [1970] N.Z.L.R. 909; *Sweet* v. *Parsley*, [1970] A.C. 132; *Kidd* v. *Reeves*, [1972] V.R. 563

56. *Sweet* v. *Parsley*, *ibid.* See also *Lim Chin Aik*, *supra*, note 40, and *Warner*, *supra*, note 41.

57. See, for example, Smith and Hogan, *Criminal Law* (third ed. Butterworths, 1973), at 72-73; Note, [1972] Crim. L.R. 780; *Gibson* v. *Arnold* (1976), 10 A.L.R. 509 at 517: "*Warner* . . . was cited to me by both counsel, and each found something in one at least of the speeches in that case to support his argument. It is difficult to extract a simple ratio from the speeches. . ."

58. *Mayer* v. *Marchant* (1973), 5 S.A.S.R. 567-571, (Bray C.J.):

> The argument to the contrary, it seems to me, is largely based on consideration of policy, because it is said, the facts in most cases are peculiarly within the knowledge of the defendant . . . but with respect to those who take this view, I think there are two answers to that. One is that those policy considerations are largely answered by leaving the evidential onus on the defendant, but the strongest answer is, in my view, that the logic of *Woolmington's Case* is compelling and I for one would be loath to tarnish the golden thread.

59. *Holt* v. *Cameron* (1979), 27 A.L.R. 311, (H.C.) affirming (1979), 22 S.A.S.R. 321. See also *Franklin* v. *Stacey* (1981), 27 S.A.S.R. 490.

60. See *Saulte Ste. Marie*, 40 C.C.C. (2d) 353 at 367, 373-374; Hutchinson, *supra*, note 41 at 434-437. An earlier example is *Preshaw, Lutz, Leblanc and Ball* (1976), 31 C.C.C. (2d) 456, (Ont. P.C.). This is also the position in Australian Code states. An example is *Ingram*, *supra*, note 29 at 251, 259, 261-262.

61. See, for example, Hutchinson, *id.*, at 435 n. 108.

remember two points. First, those who advocate placing the civil burden on the accused to make out the defence generally assume that the discussion concerns regulatory, administrative, or public welfare offences of a comparatively minor nature, rather than a major crime punishable by imprisonment for life.[62] Second, if the burden is on the accused to make out the defence on the balance of probabilities, it follows that if the evidence is evenly balanced, the jury must find against the accused. However, if this is thought to be an objection to the objectivist position on consent, it could be overcome by the legislation which would be necessary to reverse the current Canadian position on the issue of substance.

(iii) *Mistake and Ignorance*

Subjective mens rea is absent if the accused did not possess the required mental state, whether that lack was due to mere ignorance or to the accused adverting to the point at issue and reaching a conscious, but incorrect, decision. The development of the defence of mistake in Australia was conditioned by the facts of *Proudman* v. *Dayman* itself, in which the accused was eventually convicted because she had not adverted to the matter at issue at all. In short, she had not formed a mistaken belief; she was merely ignorant.[63] Hence, the law on the defence of reasonable mistake developed with the requirement that the mistaken belief of the accused must have been formed as a consequence of advertence to the fact at issue. If the accused had not thought about the matter at all, then the defence was not made out.[64] As a matter of policy, the point of the distinction was the penalization of the failure to advert to criteria of liability. However, the distinction between mistake and ignorance, if there is one, contains many difficulties. In the first place, it requires the tribunal of fact to distinguish between the person who simply did not think about the

62. Again, there is a mass of authority for this proposition. Perhaps the clearest example is Hutchinson, *id.*, at 434, in which it is said that "it is difficult to imagine that Viscount Sankey intended or even put his mind to considering whether such a rule would apply to basically regulatory offences." See also *Saulte Ste. Marie*, 40 C.C.C. (2d) 353 at 366-367.

63. *Proudman* v. *Dayman*, *supra*, note 52 at 538, 541.

64. See Howard, *supra*, note 55 at 89-92; Hall, *Principles of Criminal Law* (Bobbs Merrill, 1947), at 334 ff; Brett, *supra*, note 41 at 435. *Maher* v. *Musson*, *supra*, note 52, appears to suggest that simple ignorance will suffice for the defence. See debate in *Pelham* v. *Harris*, [1944] S.A.S.R. 224; Scarth, [1945] Qd. R. 38; *Foster* v. *Aloni*, [1951] V.L.R. 481; *Green* v. *Sergeant*, [1951] V.L.R. 500; *Gherashe* v. *Boase*, [1959] V.R. 1.

matter at all and the person who consciously or subconsciously assumed the incorrect state of affairs.[65] Howard points out that:

> If an inarticulate assumption ranks as simple ignorance, the difference depends on the extent to which D was conscious of the assumption he was making. If an inarticulate assumption ranks as a mistake, the difference depends on the extent to which D was conscious of anything at all. Either way the difference is only a degree of consciousness. It may be said that although questions of degree are unavoidable in law, they should not be introduced without good reason because they inevitably bring with them an element of arbitrariness in making decisions; and that for this reason also the defence of reasonable mistake of fact should be inclusive of reasonable simple ignorance.[66]

This matter is of some importance in the present context, for, as shall be seen below[67], those who would overturn *Morgan* favour a requirement of advertence on the part of an accused who would escape. They argue that there are "good reasons" for its use in this area. But a good reason may not be persuasive enough, for, in the second place, the distinction between mistake and ignorance is arbitrary in that, if it means anything at all, it cuts across the policies inherent in the punishment of unreasonable behaviour. Either it is always unreasonable to fail to advert to the question, in which case the requirement of mistake adds nothing to the requirement of reasonableness, or it is the case that one may act reasonably in failing to advert to the question, in which case the requirement of mistake will result in the conviction of an accused who, ex hypothesi, has acted reasonably. The point was made by Bray C.J. of the South Australian Supreme Court in *Kain & Shelton Pty. Ltd.* v. *McDonald,* when he said that:

> Speaking solely for myself, I fail to see why a man who has never directed his mind to a particular question should necessarily be more blameworthy than one who has done so but came to an erroneous conclusion due to a mistake of fact. In either case there may or may not be blameworthiness. A man may be unreasonable in arriving at a mistaken conclusion; he may not be unreasonable in not thinking about the matter at all.[68]

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65. See, for example, the comprehensive and thoughtful analysis by Fisse, *Probability and the Proudman* v. *Dayman Defence of Reasonable Mistaken Belief* (1974), 9 M.U.L.R. 477 at 505ff.
66. Howard, *supra,* note 19 at 367.
67. *Infra,* notes 76, 136-147, 158ff.
68. (1971), 1 S.A.S.R. 39 at 45.

Preference for the overriding test of culpability by reasonableness, and hostility to the artificiality of the distinction between mistake and ignorance, led the Supreme Court of South Australia to restrict the operation of the latter criterion in the subsequent decision of *Mayer* v. *Marchant*.[69] In essence, the accused was charged with being the owner of an overloaded tanker, contrary to the provisions of the Road Traffic Act. His tanker was overloaded with distillate, and his explanation for the excess weight was that the distillate supplied was of an abnormally high density, of which the accused had no knowledge and which he had no reason to suspect. Some eighteen months previously, a series of weighbridge checks made of various distillates had established that 6400 gallons of distillate would produce a weight within a few hundredweight of the statutory limit. As the accused had loaded 6400 gallons on subsequent trips, he was aware that this practice might produce a slight overload, but that a slight excess was accepted as tolerable by the weighbridge officers. In the end, the accused was acquitted by a majority which held that the appropriate applicable defence was "act of a stranger".[70] So far as the defence of reasonable mistake was concerned, however, the accused could not satisfy the requirement that, on the facts as he believed them to be, his acts were "innocent", for even if the distillate had been more normal, he had run the risk of being slightly over the limit.[71] Alternatively, he had made a mistake of law in believing that the slight excess would be tolerated.[72] Despite these findings, all three members of the court discussed the requirement of conscious mistake. All else being equal, would it have mattered that the accused formed no belief as to the

69. *Supra*, note 58.

70. *Id.* at 573:

> Normally speaking it is a defence to criminal charge . . . to show that the forbidden act occurred as the result of an act of a stranger, or as the result of nonhuman activity, over which the defendant had no control and against which he could not reasonably have been expected to guard.

See also *Snell* v. *Ryan*, [1951] S.A.S.R. 59; *Norcock* v. *Bowey*, [1966] S.A.S.R. 250; *Boucher* v. *G. J. Coles & Co.* (1974), 9 S.A.S.R. 495; *Flyger* v. *Auckland City Council*, [1979] 1 N.Z.L.R. 161; *Gonder* (1981), 62 C.C.C. (2d) 326, (Y.T.C.).

71. *Mayer* v. *Marchant*, *supra*, note 58 at 568-569. See also, generally, the mess created by the Supreme Court of Canada of the same rule in *Kundeus*, [1976] 2 S.C.R. 272, 37 C.R.N.S. 129,62, D.L.R. (3d) 145, 24 C.C.C. (2d) 276, [1976] 1 W.W.R. 8, 5 N.R. 471, and Note, (1976) 8 Ott. L.R. 91; Weiler, *Regina* v. *Kundeus: The Saga of Two Ships Passing in the Night* (1976), 14 Osgoode Hall L.J. 457.

72. *Id.*, at 588-589.

particular load in question if he had, sometime in the past, formed an exculpatory belief as to loads in general? All three members of the court held that the general belief sufficed for the specific occasion. For example, Hogarth J. decided that:

> A defendant who wishes to rely on this defence is not required to advert particularly to the circumstances each time a recurring act occurs. If he applies his mind on one occasion, and then forms the honest and reasonable belief that he is not in breach of the law so long as the same set of circumstances is repeated, then I think that he is only required to establish a belief that in the particular instance. . .he honestly and reasonably believed those circumstances were being repeated. Thus, if several years ago (the accused) had honestly and reasonably formed a belief that a particular gallonage loaded onto his tanker would not result in the vehicle exceeding the legal limit, then in any case where he permitted the vehicle to be on the road only when it was so loaded, this would be sufficient to bring him within the defence.[73]

The meaning and limits of this extension of the notion of mistake have not been further tested by litigation, but they reveal at least judicial impatience with the arbitrary distinction between mistake and ignorance when it cuts across the culpability requirement at the heart of the defence. There is no evidence to date that Canadian courts will pick up the distinction as a consequence of *Sault Ste. Marie*. In that case, Dickson J. emphasized the requirement of reasonableness without making explicit reference to the distinction between mistake and ignorance. On the other hand, his opinion is expressed in the language of positive belief, so the matter is not free from doubt.[74]

The distinction between mistake and ignorance is emphasized here because of the prominence that it has been given by proponents of rape reform. It is argued that all accused must satisfy a duty of reasonable inquiry as to consent if they are to deny culpability. Moreover, the distinction has achieved some prominence in the context of the concept of recklessness, to be discussed below.[75] The strengths of the argument for reform may best be judged in the context of a hypothetical case.

Suppose that the accused has been living with the victim for ten years. For the first six years of the arrangement, the sexual relationship between the two was a happy one. But then the male becomes an odious

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73. *Id.*, at 576. See also *id*, at 570, 588.
74. See, for example, 40 C.C.C. (2d) 353 at 373-374. See also the interesting decision in *Preshaw et al, supra*, note 60 at 465.
75. *Infra*, notes 136-147, 158ff.

drunk. He gets high and demands sexual intercourse nightly. She consents, not from fear of physical injury, but because she believes that it is her duty to do so. She hates the performance and copes by taking Valium, closing her eyes, and remaining motionless. One night, she takes too much Valium and passes out, after which he has sexual intercourse with her. Let us assume that sexual intercourse with an unconscious woman is intercourse without her consent. Let us assume further that he made no inquiry. It is really impossible to tell whether he thought about the matter at all and, since he was very drunk, he cannot remember if he did.[76] He assumed, he thinks, that she was doing what she always did. He had no grounds, reasonable or otherwise, to assume that anything had changed. In this case, is the accused guilty of rape? Is he "culpable"? Much as one may regret the lack of sexual variety and enthusiasm in such a relationship, it is hard to see why this accused should be declared culpable.

Pickard puts the argument for culpability as follows:

> Because it is the act of penetration which the offence of rape prohibits in a given context, a man about to penetrate has his mind focused necessarily on the legally relevant transaction. He is about to engage intentionally in the specific act which can itself be harmful, and whether or not the act is harmful in any particular instance cannot be determined without reference to the world outside him. That is sufficient reason to require him, as an initial matter, to inquire into consent before proceeding. No accused should be able, therefore, to defend himself successfully against a rape charge by claiming that he had no belief whatsoever about consent because he simply did not advert. He must put forward more than a claim of mere absence of knowledge of non-consent: he must assert a belief in consent.[77]

This seems very persuasive. Yet it contains a number of defects. First, such a position only makes sense if it is assumed that it is possible for the average judge to instruct the average jury as to the difference between mistake and ignorance, without thoroughly confusing the jury. It is simply not enough for Pickard to posit the distinction — the difference must be defined for the marginal cases and not just the clear ones. Second, if it is always unreasonable to make no inquiry, what is

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76. See *Pike*, [1961] Crim. L.R. 114, 547. For the proposition that sexual intercourse with an unconscious victim is rape, see Mewett and Manning, *supra*, note 32 at 417.

77. Pickard, *supra*, note 17 at 76-77. At 77 n.6, it is stated that "[s]uch complete inadvertence is extremely difficult to imagine and, to my knowledge, has never been claimed." That depends upon what one means by inadvertence: see, for example, *McEwan*, discussed, *infra*, at note 185.

added by the requirement of mistake? If, as is more likely, it is admitted that a failure to advert may be reasonable in some cases, then what is the justification for overriding the general test of culpability, namely reasonableness, with another test which operates on another very inflexible standard of culpability based on unproven assumptions about the nature of sexual relationships?

(iv) *Reasonableness*

The essence of the objectivist position is, of course, its emphasis upon the requirement that, in order to exculpate, any mistaken belief must be reasonable. As almost every pass-standard law student knows, the imposition of the requirement of reasonableness requires the tribunal of fact to measure the behaviour of the accused against that of the reasonable person. The requirement of the reasonableness of the mistake is equivalent to that used in the context of negligence.[78] Although formulations vary, the essence of the concept was captured by the American Model Penal Code, as follows:

> A person acts negligently with respect to a material element of an offence when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.[79]

That reputedly amiable and sober individual, the reasonable man, has been described in the following way by Glanville Williams. "*Homo juridicus* is the ideal man, the moral man, the conscientious man — not setting the standard so high that life becomes impossible in ordinary terms, but nevertheless requiring the most careful consideration to be given, so that harm is avoided and the law obeyed."[80]

There has been considerable confusion between the concepts of

78. Howard, *supra,* note 19 at 373. The difference between the consequences of the application of the criminal law and the application of the law of negligence results in a stricter standard for the former test, of course.

79. Model Penal Code of the American Law Institute, Proposed Official Draft, 1962, 2.02(2) (d).

80. Glanville Williams, *supra,* note 15 at 43. *Ibid*: ". . . the lawyer's imagining is the prudent, cautious, circumspect, anxiously calculating paragon who is held up by the judges as a model of behaviour."

negligence and recklessness — sometimes called advertent and inadvertent negligence — in the criminal law of England, Australia, and Canada. This dispute is crucial, for it determines the boundary between the objective and the subjective positions. There have been many causes of confusion and debate, but not the least has been the fact that the cases which have arisen for high level decisions have concerned driving offences. These decisions are suspect for general reasons.[81] The law has always sought to convict those who depart from the standard of the ordinary prudent driver, and juries have always resisted because they too drive cars and can envision themselves in the dock for inadvertence. Although it is not illustrated by spectacular appellate decisions, the South Australian experience is instructive. The large rise in motor car ownership and use after 1945 brought with it the usual story of road tragedy. Where the dangerous driver caused death, the Crown's practice was to charge "motor manslaughter" on the basis of criminal negligence The leading authority was the House of Lords decision in *Andrews,* and, despite some ambiguity in that decision, it was taken, probably correctly, as requiring conviction if the Crown could prove that the accused caused the death of another human being as the result of the grossly negligent operation of a motor vehicle.[82] The law, however, was unworkable. Juries were required for the manslaughter charge, and yet juries refused to convict. The result was legislation: an included offence and an offence of causing death by dangerous driving.[83] The key to the reaction lay in the response of the jury. In the words of Glanville Williams, "The jury or magistrate apply the negligence test, roughly speaking, by asking themselves: Was the defendant a bigger fool than I like to think I should have been in the same circumstances."[84]

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81. Hence the notorious controversy over *O'Grady* v. *Sparling,* [1960] S.C.R. 804, 128 C.C.C.1, 25 D.L.R. (2d) 145, 33 C.R. 293, 33 W.W.R. 360; *Mann,* [1966] S.C.R. 238, [1966] 2 C.C.C. 273, 47 C.R. 400, 56 D.L.R. (2d) 1; *Binus,* [1966] 2 O.R. 324, [1966] 4 C.C.C., 193, 48 C.R. 279, (C.A.), [1967] S.C.R. 594, [1968] 1 C.C.C. 227, 2 C.R.N.S. 118; *Peda,* [1969] S.C.R. 905, [1969] 4 C.C.C., 245, 7 C.R.N.S. 243, G.D.L.R. (3d) 177. See also *Andrews* v. *D.P.P.,* [1937] A.C. 576; *Conventry* (1938) 59 C.L.R. 633; *Callaghan* (1952), 87 C.L.R. 115; *Lawrence,* [1981] 1 All E.R. 961, (1937), 53 L.Q.R. 380; Burns, *An Aspect of Criminal Negligence* (1970), 48 Can. B.R. 47. See also *Madigan,* [1982] Crim. L.R. 692.

82. Howard, *supra,* note 19 at 100-102; Colvin, *Recklessness and Criminal Negligence* (1982), 32 U.T.L.J. 345 at 352-353.

83. *Criminal Law Consolidation Act,* 1935-1982, s.14A.

84. Glanville Williams, *supra,* note 15 at 49.

In Canada, similar disputes led appellate courts to confusion and the position that the jury should be kept uninformed as often as possible.[85] There are lessons in this for those who would impose the negligent standard for rape. Negligence is not the simple objective test which it appears to be, nor would it solve the problem of what are perceived to be unjustified acquittals. It might, however, achieve the result of unjustified convictions. Moreover, there is no point in any analysis of the tortured semantics of the driving cases. In the present context, it is enough to point out that the reality of the objective test is not the fine measuring of the behaviour of the accused against that to be expected of homo juridicus, the hypothetical reasonable man. Rather, it is the testing of the behaviour of the accused against that which the jury would expect of themselves under the same circumstances. The standard of the reasonable person is nothing more than an excuse behind which to hide "subjective" judgments concerning what we all would expect of ourselves. Given that the jury is supposed to represent the assessment of the community, such a conclusion is hardly surprising and is, moreover, difficult to attack.

But what the law gives with the one hand, it take away with the other. It is obvious that the more reasonable the belief of the accused is, the more likely it is to be believed by others. If the accused asserts a belief which is utterly unreasonable, then, even given the meaning of reasonable belief suggested above, it is possible that he or she will be believed, but unlikely. It follows that, where the actual belief of the accused is in question, the matter of reasonableness is but evidence which goes to the jury along with the evidence offered of the actual belief. On the other hand, where reasonableness is a legal requirement, the evidence of the actual belief of the accused may be withdrawn from the jury if the judge believes that the evidence that the accused entertained a reasonable belief is insufficient or not for the jury. In short, the requirement of reasonableness is but a ground upon which the judge is given additional power to constrain the decision-making powers of the jury.[86] The requirement of reasonableness confers powers of

85. Gordon, *Subjective and Objective Mens Rea* (1975), 17 Crim. L.Q. 355 at 383: "The solution to the foresight problem is just not to tell the jury about it, but to rely on them to be able to discriminate between bad driving which is merely careless, and bad driving which is so bad as to be really criminal." See also Colvin, *supra,* note 82 at 355 n.67.

86. See, for example, Glanville Williams, *supra,* note 15 at 85; Brett, *supra,* note

decision upon both judge and jury to depart from the facts. The jury is given the power to impose its standards of behaviour upon the accused, and the judge is given the power to decide whether or not the belief of the accused as to consent shall be given to the jury. None of the proponents of reform of the laws governing rape have addressed the question of whether these results are either necessary or desirable. Nevertheless, both are inevitable concomitants of the decision to impose the requirement of reasonable belief.

(b) *The Subjectivist Position*

(i) *Mens Rea and "Intention"*

It is usual for those favouring the subjective view of the current element in rape to speak in terms of an *intention* to have sexual intercourse with another person without the consent of that other person.[87] Unfortunately, they do not do so with any consistency; the careful reader will also find such terms as "knowledge" and "recklessness" used interchangeable as criteria of subjective culpability.[88] The meaning of these terms is and has been the subject of continuing debate.[89] They are ephemeral in the sense that there are no agreed limits to their meaning, nor is there likely to be. But this is a general problem which is not confined to the issue of rape. Rather than essay a further contribution to the somewhat sterile debate over the meaning of such words in general, the ambit of their meaning in the context of other words serving similar purposes, specifically in the context of the consent element in rape, will be examined here.

"Intention" seems to sit between "wilful" and "malicious", on the one hand, and "knowledge" and "belief", on the other.[90] The

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41 at 434; Note also, *Rape: Reasonableness and Time* (1981), 1 Ox.J.L.S. 432 at 436.

87. See, for example, *Brown, supra,* note 43; *Morgan, supra,* note 12; *Pappajohn, supra,* note 45.

88. See, for example, *Pappajohn,* 52 C.C.C. (2d) 481 at 488:

> [I]ntention as to consent is central to responsibility; a man should only be punished where he proceeds with an act of violation in the *knowledge* that consent is withheld, or in a state of *recklessness* as to whether willingness is present. The *intention* to commit the act of intercourse and to commit that act in the absence of consent . . . (emphasis added).

89. See, for example, the debate between Buzzard, *Intent,* [1980] Crim. L.R. 5; Smith, *Intent; A Reply,* [1980] Crim. L.R. 14; Duff, *Intention, Mens Rea and The Law Commission Report,* [1980] Crim. L.R. 147.

90. See, for example, the judgment of Windeyer J. in *Ianella* v. *French* (1968), 119 C.L.R. 84 at 105-108, for perceptive discussion of "wilfully".

differences between "intention", "malice", and "wilfulness" are obscure.[91] It is fortunate that a semantic comparison suffices for the purposes of the present discussion. Insofar as the concepts of "malice" and "wilfulness" require proof of something more in the mind of the accused than does "intention", that extra proof is not required in order to convict someone of rape.[92] The concepts of "knowledge" and "belief" are usually regarded as being less demanding of a conviction than is the concept of "intention", and this difference is commonly thought to hinge on the idea of "desire" or "purpose". A person may be said to intend a result when he or she desires that result to occur or acts with the purpose of promoting that result.[93] A person does not intend a result, although he may know or believe that it will occur, if he or she does not desire that result or does not act with the purpose of its accomplishment. There is, however, a difference between the natural meaning of words and concepts, and the meaning of those words and concepts in the context of the functional purposes of the criminal law.[94] Suppose someone is accused of determining to sabotage a test plane. He places a bomb on the prototype with the purpose of destroying it. He knows that the pilot will die in the explosion, but regards that consequence as an undesirable but necessary side effect. Suppose further that the pilot dies and that the accused denies an intention to kill. It may be argued, with some force, that knowledge by the accused of the virtual/practical/substantial certainty of the death should suffice as an intention to kill.[95] Opinions differ, but most agree that such

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91. See, for example, *R.* v. *Smith* (1976) 32 C.C.C. (2d) 224, (Newf. D.C.); *R.* v. *Buzzanga & Durocher* (1979), 49 C.C.C. (2d) 369, (Ont. C.A.).

92. See Glanville Williams, *supra,* note 15 at 87-88.

93. Mewett and Manning, *supra,* note 32 at 91-96; Glanville Williams, *id.,* at 51; Howard, *supra,* note 19 at 348-353; *Buzzanga & Durocher, supra,* note 91 at 383. See also, generally, the useful discussion by Fletcher, *supra,* note 19 at 440, 442 ff.

94. Cf. the dispute between Lord Diplock and Lord Edmund Davies in *Caldwell,* [1982] A.C. 341, [1981] 2 W.L.R. 509, [1981] 1 All E.R. 961. See also Fletcher, *supra,* note 19 at 702, where he says that "[w]e may not wish to go so far as Coke in limiting the methods of the law to a trained elite, but it seems equally in error to go to the opposite extreme . . . and decide difficult cases simply on the basis of what the ordinary man would call rape."

95. See the generally unproductive debate exemplified by Glanville Williams, *Criminal Law: The General Part* (second ed., Stevens, 1961) at 38; Glanville Williams, *supra,* note 15 at 64-65; Smith & Hogan, *supra,* note 57 at 50; Cook, *Act, Intention and Motive in the Criminal Law* (1917), 26 Yale L.J. 645; Buzzard, Smith and Duff, all cited, *supra,* at note 89; McEwan and Robilliard, *Recklessness:*

knowledge may be equated with intention. If that is accepted, however, then "intention" may be defined not only in terms of desire or purpose, but also in terms of "mere" foresight, no matter how certain. Although that foresight may be qualified by such adjectives as substantial or virtual, the distinction between the accused's intention and his foresight of the degrees of likelihood that an event will occur becomes blurred.[96] The continuum may be represented as follows:

	MALICE
Legal Intention?	WILFULNESS
	INTENTION PURPOSE/DESIRE
	FORESIGHT OF VIRTUAL/ SUBSTANTIAL CERTAINTY
	FORESIGHT OF PROBABILITY
Recklessness?	FORESIGHT OF POSSIBILITY
	KNOWLEDGE/BELIEF

It is not necessary for present purposes to decide where the distinctions are to be drawn between the various concepts. It will, however, be necessary to determine the appropriate criterion of culpability if the subjective path is to be followed. Those courts which have taken the subjectivist position have agreed that recklessness with regard to whether or not the victim was consenting will suffice as a reason for conviction, in the event that the victim was not consenting.[97] The meaning of the term "recklessness" in this context will be discussed below. It is, however, first necessary to deal with a particular problem posed by the application of the central concept of intention to the element of

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The House of Lords and the criminal law (1981) 1 L.S. 267. See also the opinion of Rehnquist J. in *U.S.* v. *Bailey* (1980), 444 U.S. 394 at 403-410.

96. See, for example, *Buzzanga & Durocher, supra,* note 91 at 384-385:

> [A] person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence. The actor's foresight of the certainty or moral certainty of the consequence resulting from his conduct compels a conclusion that if he, none the less, acted so as to produce it, then he decided to bring it about (albeit regretfully), in order to achieve his ultimate purpose. His intention encompasses the means as to his ultimate objective.

97. See, for example, *Morgan,* [1975] 2 All E.R. 347 at 352, (Lord Cross); 362, (Lord Hailsham); and 382, (Lord Fraser). Indeed, Pickard's harsh words about *Pappajohn* relate to the *meaning* of recklessness rather than whether it is an available criterion of responsibility or not; Pickard, *Culpable Mistakes And Rape: Harsh Words on Pappajohn* (1980), 30 U.T.L.J. 415. She does not analyze the case in question at all as to the evidentiary bar.

consent. The problem relates to the interrelationship of the central concept of intention with the defence of honest and reasonable mistake. Bray C.J., of the South Australian Supreme Court, formulated the difficulty as follows:

> It is sometimes put that mistake negates mens rea. In my opinion, though it may do so and very often will do so, yet the absence of mens rea and the existence of a mistaken belief in circumstances which would make the act innocent are not necessarily identical, and mens rea may co-exist with the existence of such belief and hence there may be room for the defence even where mens rea is an essential element of the crime. To apply that to the case of rape, a man may intend to have intercourse with a woman whether she consents or not but still believe, and perhaps reasonably believe, that she is consenting. In that case there would be mens rea but the belief may be effective to establish the defence.[98]

This is a startling development. The judge is saying that the accused may be found to have committed the actus reus of rape, with the intention to commit rape, and yet escape prosecution because he believes, on reasonable grounds, that the victim was consenting at the crucial moment. Such cases undoubtedly may occur, but will, of course, be extremely rare, and the task of explaining this to the jury will be difficult. Indeed, it may not be too much to suggest that a jury will receive this law with such incredulity that they are likely to ignore it. Nevertheless, the problem as such exposes matters of deeper significance.

Whether or not Bray C.J. is right is a moot point. It is usual to regard elements which require proof of mens rea and elements which attract the defence of reasonable mistake as mutually exclusive categories. Moreover, it is usual to regard a mistaken belief that is based on reasonable grounds as being inconsistent with mens rea; that is, it is thought that with regard to the element of the offence in question, the accused cannot have the required mens rea and entertain a reasonable belief at the same time.[99] Further, if the relevant time is the time at which the act of sexual intercourse took place, then the pre-existing intention of the accused is, arguably, only evidence of the state of mind of the accused at the crucial time,

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98. *Brown, supra,* note 43 at 144, affirmed in *Wozniak & Pendry* (1977), 16 S.A.S.R. 67 at 71. Similar views are expressed by Howard, *supra,* note 19 at 152, and by Kitto J. in *Reynhoudt, supra,* note 52 at 389.

99. Cf. Fletcher, *supra,* note 19 at 688, 700; Heilbron, *supra,* note 13 at paras. 53-56; *Wozniak & Pendry, id.* at 77, (Bright J. dissenting).

evidence which is negated by proof of the state of reasonable belief at that time.[100] It is, however, submitted that the solution to the problem lies in the interaction between the concept of intention and the application of that concept to the surrounding circumstances of any given offence. It is relatively easy to understand the speaker who describes an action or its consequences as intended. The speaker is describing a desire to do an act, or a desire that a consequence shall result from an act. But the meaning of intention is more obscure if one speaks of the circumstances surrounding and qualifying an action or its results. Smith has described the obscurity thus:

> The existence of the circumstances [may] be either "intended" or "known". What is the difference? To say that a person "intends" that something shall be so implies that he proposed to do or refrain from doing something to make it so; that he has, or believes he has, some prospect of being able to cause it to exist. A circumstance is "known" rather than "intended" where its existence is entirely beyond the control of the parties. If the parties know that P is fourteen years old they also know that she will be under the age of sixteen next Friday, when they intend to take her out of the possession of her father against her will. It would not be very sensible to say that they "intend" her to be under sixteen. If, however, being persons who have attained the age of twenty-one, they agree to commit buggery together and invite E to be present it might fairly be said that they intend the circumstance of E's presence . . . E's presence, unlike P's age, is a fact over which they can exercise some degree of control, and it is sensible to speak of it as being "intended".[101]

Hence, it may be postulated that a condition or circumstance is intended when it is a condition for acting, or where it is under the control of the actor. On the other hand, a circumstance is known when the actor foresees its existence to some degree without any desire that it shall exist. An illustration of this point, which also demonstrates that circumstances may be thought of as circumstances of an offence required by law or circumstances of collateral fact determinative of legal application, is the case of the plane

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100. *Wozniak and Pendry, ibid:* "I do not think it possible to say of a man who believes that the woman is consenting that his intention is to have sexual intercourse with a non-consenting woman. She has, at the time of penetration, the character of a consenting woman so far as he is concerned . . . it savours of extreme unreality . . . the realms of Kafka . . ." Accordingly, note *The Necessary Intent in Rape* (1977), 8 Sydney L.R. 196 at 205.

101. Smith, *Conspiracy Under The Criminal Law Act (1),* [1977] Crim. L.R. 598 at 603.

saboteur referred to above.[102] Duff comments that "his *aim* is just 'to destroy the plane', and there is no conceptual connection between *that* and causing death (he could destroy it safely on the ground): but surely he *intends* 'to destroy the plane in flight with passengers', and thus to kill them, unless it is conceivable that they should all survive the explosion."[103] It follows that, in referring to circumstances, one must distinguish two kinds of intention: "pure intention", that is, intention in the sense that something is desired or controlled, and "constructive intention", in the sense that the thing is not desired, but is foreseen to some degree.

In the context of rape, it is apparent that it makes little sense to refer to pure intention with respect to the circumstances of consent. It is clear that the law seeks to punish those whose intentions would be frustrated if the woman in question did, in fact, consent to an act of sexual intercourse, those whose aims are that the woman does not consent, or those who, if they had the choice, would choose the partner who does not consent. But the law of rape is not restricted to that class of persons; it is also there to catch those who have sexual intercourse intentionally, knowing that the victim does not consent.[104] While deferring for later consideration the extent and meaning of the concept of knowledge, this is sufficient to dispose of the anomaly expressed by Bray C.J. The interaction that he describes between the concept of intention and the defence of reasonable mistaken belief makes sense only if he is speaking of pure intention. Ex hypothesi, that cannot be so in cases of rape or, indeed, in the case of any crime in which the mental element attributable to a circumstance crucial to liability must be interpreted in terms other than pure intention, for one cannot simultaneously

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102. *Supra,* notes 95-96.

103. Duff, *supra,* note 89 at 154, citing the speech of Lord Hailsham in *Hyam* [1974] 2 All E.R. 41 at 52.

104. Duff, *id.,* at 151: "[W]e can distinguish a man who intends 'to have non-consensual intercourse', for whom [the female's] lack of consent is part of his aim, from one who merely knows that she does not consent; the former is, as the latter is not, *frustrated* in his attempt if it turns out that she did consent." As Professor Smith has pointed out, this distinction poses enormous problems for the present law on the mental element required for attempted rape: Note, *R.* v. *Pigg,* [1982] Crim. L.R. 446 at 449: "[I]t is difficult to suppose that this element of purpose has to be applied to all the circumstances and the definition of the offence. It will hardly ever be part of the defendant's purpose in rape that woman should be not consenting. He will not consider himself to have failed if, to his surprise, she welcomes him with open arms. So the law should not require more than, at the most, that the defendant should *know* that the woman is not consenting."

know that the victim is not consenting and yet *believe* that she is consenting.[105]

It follows that the subjectivist position on the consent element of rape can be sensibly expressed only in terms of degrees of foresight, rather than in terms of pure intention. It also follows that the definitional distinctions between various degrees of foresight must be decided. There can be no doubt that subjectivist law insists that a reckless accused is culpable and shall be found guilty of rape. One example among many is the speech of Lord Hailsham in *Morgan*, in which he said that ". . . if the intention of the accused is to have intercourse nolens volens, that is, recklessly and not caring whether the victim be a consenting party or not, that is equivalent on ordinary principles to an intent to do the prohibited act without the consent of the victim."[106] Hence, the accused shall be culpable if he or she intends to have sexual intercourse with another person without their consent, in the sense of desiring that situation; certainly, the accused shall be culpable if he or she knows that the other person is not consenting. In addition, the accused shall be guilty if he or she is reckless as to the consent of that other. Discussion now turns to the meaning of the notion of recklessness.[107]

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105. Duff, *id.* at 154-55:

> The rapist who knows that she does not consent intends 'to have non-consensual intercourse', not just 'to have intercourse' whether or not her lack of consent is part of his purpose. Since the circumstances are *given* as the context in which he acts, whereas the consequences occur only because he acts, we may reasonably say that he intends his action not just under a description 'X' which picks out the result at which he aims, but under a description 'X in C' which also specifies the circumstances in which he acts.

The dissent of Wells J., in *Brown, supra,* note 43, was based on his view that the mental element in rape should be described in terms of knowledge and recklessness rather than intention. That view was supported by the Mitchell Committee, *supra,* note 27 at 4-8, and by legislation; see, *supra,* note 43.

106. *Morgan,* [1975] 2 All E.R. 347 at 357; see also Lord Cross at 352; Lord Simon at 365. South Australian judges agree: see Brown, *supra,* note 43; *Wozniak & Pendry, supra,* note 98. While the majority judgement of McIntrye J. in *Pappajohn, supra,* note 45 does not address the issue, Dickson J. is of the clear opinion that recklessness will suffice: 52 C.C.C. (2d) 481 and 488, 493. This view is commonly shared: see, for example, *R.* v. *P.* (1976), 32 C.C.C. (2d) 400 at 407, (Ont. H.C.). The contrary view is principally espoused by those who, in the submission of this author, incorrectly classify recklessness as a form of intention. See, for example, McEwan and Robilliard, *supra,* note 95 at 275.

107. See, for example, Stuart, *supra,* note 25 at 162, and Glanville Williams, *Intention And Recklessness Again* (1982), 2 L.S. 189 at 189, where he stated that "the question of definition, therefore, affects the limits of liability."

(ii) *The Meaning of Recklessness in General*

A convenient starting point for the definition of recklessness is provided by the Model Penal Code of the American Law Institute, in which it is stated that:

> A person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law abiding person would observe in the actor's situation.[108]

The English Law Commission Working Party proposed the following definition:

> A person is reckless if, (a) knowing that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk, and (b) it is unreasonable for him to take it having regard to the degree and nature of the risk which he knows to be present.[109]

These definitions must be accepted for the purpose of analysis, for those produced by a variety of courts are less than rigorous. It may be seen that the concept of recklessness so defined contains two general elements. First, there is the "objective" assessment of the nature and degree of the risk as it existed at the relevant time, and second, there is a "subjective" element regarding the perception, by the accused, of the nature and existence of the risk.[110]

(iii) *The Nature and Degree of the Risk*

As stated by the American Law Institute, the risk must be "substantial" in degree and "unjustifiable" in nature. These two adjectives are not conceptually distinct; indeed, they exhibit a marked tendency to shade into each other.[111] Keeping that

108. Model Penal Code of the American Law Institute, Proposed Official Draft (1962), 2.02 (2)(c).

109. Law Commission Working Party, Paper No. 31 (1970), Propositions 7B, 7C. See also Law Commission, *Report On The Mental Element of Crime*, No. 89 (1976).

110. In addition to the works cited below, see also Howard and Elliott, "The Concept of Recklessness in the Criminal Law", in Morris and Perlman, eds., *Law and Crime: Essays in Honour of Sir John Barry* (Gordon and Breach, 1972) at 50; Duff, *Intention, Recklessness and Probable Consequences*, [1980] Crim. L.R. 404.

111. See, for example, Glanville Williams, *supra*, note 15 at 73; Howard, *supra*, note 19 at 356, on ". . . the dependence of probability upon justification."

cautionary note in mind, how substantial must the risk be? The concept of recklessness was developed initially in the context of murder.[112] There seems to be a general agreement as to the kind of words that may be used to instruct the jury in murder cases, but there is less agreement on the meanings of the words that are used, apparently interchangeably. For example, the Australian murder cases mandate the use of the words "probable" or "likely".[113] The House of Lords in *Hyam* used the words "likelihood", "probability", "high" and "extreme probability", "risk", and "serious risk".[114] The Canadian Code appears to be content with the word "likely" in the context of homicide,[115] but it may be of some significance that Dickson J. in *Leary* used the word "probable" in the context of recklessness as sufficient mens rea for rape.[116] There is no warrant for belief that the courts have intended to distinguish between "probable" and "likely", even if such a distinction could be found. There is also no point in any attempt to quantify the risk referred by the words "probable" and "likely", for the courts are more interested in the words as descriptions of the parameters of risk within which a jury may legitimately assign blame than they are in asking the jury to assess an exact mathematical chance. In addition, the intricacies of probability theory are inappropriate in the area between criminal and non-criminal behaviour and, in particular, the *exact* degree of risk must be determined by other factors in any given fact situation, notably by the *nature* of the risk concerned.[117] The nature of the risk will be considered below. It suffices at this point to note that the correlation between "justification" and degree of risk is multi-contoured, so that one concept overlaps with the other to an extent that precludes the easy interaction normally presumed.

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112. See the development of recklessness at common law in *Serne* (1887), 16 Cox C.C. 311 at 314; *Stones* (1955), 72 W.N. (N.S.W.) 465 at 471; *Hallett*, [1969] S.A.S.R. 141; *Pemble* (1971), 123 C.L.R. 107; *Hyman*, [1975] A.C. 55; *La Fontaine* (1976), 136 C.L.R. 62; *Solomon*, [1980] 1 N.S.W. L.R. 321.

113. *Ibid.* That is the view of the authors of the Model Penal Code, Tentative Draft No. 4 (1955) at 125-126; Glanville Williams, *supra*, note 15 at 73; Howard, *supra*, note 19 at 356.

114. See, generally, Glanville Williams, *id.*, at 214-216; Gordon, *supra*, note 85 at 381.

115. *Criminal Code*, R.S.C. 1970, c. C-34, s. 212.

116. *Leary*, [1978] 1 S.C.R. 29 at 34, 33 C.C.C. (2d) 473, 74 D.L.R. (3d) 103, 37 C.R.N.S. 60, [1977] 2 W.W.R. 628, 13 N.R. 592.

117. Thorough discussion of the quantification of the degree of risk involved may be found in Fisse, *supra*, note 65; Treiman, *supra*, note 25 at 318ff. Braum,

If it is assumed for the purposes of the present discussion that the accused may be found guilty of reckless homicide if he or she foresaw that death or grievous bodily harm was *probable* or *likely*, it does not necessarily follow that the same formula, suitably amended, forms the minimum culpability requirement qua the consent element of rape. Despite the use of the word "probable" by Dickson J. in *Leary*,[118] the case of rape concerns a circumstance of liability and not the consequence which determines liability,[119] and the interests protected by the two crimes, while analogous, are different.[120] However, once it is accepted that recklessness with regard to the consent of the victim is sufficient to determine criminal liability for rape, then disputes[121] concerning whether foresight of the certainty/virtual certainty of the existence of the consent is more properly described as intention or recklessness are of no consequence.[122] The crucial question is whether the line of minimum culpability is to be drawn at situations in which the accused has sexual intercourse without consent while being aware of the probability or likelihood that the victim does not consent, or whether it is to include those situations where the accused is aware of the *possibility* or chance that the victim does not consent.

Quantitative Analysis and the Law: Probability Theory as a Tool of Evidence in Criminal Trials [1982] Utah L.R. 41. For the view that quantification is a totally fruitless exercise, see Glanville Williams, *supra*, note 15 at 73, 215-216; Howard, *supra*, note 19 at 53-54; and the much quoted dictum of Lord Reid in *South Portland Cement Ltd.* v. *Cooper*, [1974] A.C. 623, [1974] 1 All E.R. 87, [1974] 2 W.L.R. 152 at 160:

> Chance probability or likelihood is always a matter of degree. It is rarely capable of precise assessment. Many different expressions are in common use. It can be said that the occurrence of a future event is very likely, rather likely, more probable than not, not unlikely, quite likely, not improbable, more than a mere possibility, etc. It is neither practicable nor reasonable to draw a line at extreme probability.

118. *Supra*, note 116.

119. See, for example, the distinction drawn by both Duff and Smith in passages immediately following those quoted in note 103, *supra*, and Treiman, *supra*, note 25 at 323: "When speaking of an attendant circumstances we are not dealing with a concept of risk creation, since the circumstances . . . must already exist . . ."

120. See Pickard, *supra*, note 17 at 413, who argues for mens rea standards which are individual to the crime in question.

121. See, for example: (a) Buzzard, *Intent* [1978] Crim. L.R. 5; Smith, *Intent: A Reply* [1978] Crim. L.R. 14, and (b) McEwan and Robilliard, *supra*, note 95; Glanville Williams, *supra*, note 107; McEwan and Robilliard, *'Intention and recklessness again' — a response* (1982), 2 L.S. 198.

122. See, for example, *R.* v. *Buzzanga & Durocher*, *supra*, note 91 at 384-385.

While it is true that the traditional sources discuss the concept of recklessness, in general, in terms such as "probability", "likelihood", or "substantial", "serious", or "gross" risk,[123] the courts in which the question has recently arisen for decision have decided that the jury is to be directed that, in the case of rape, it is sufficient for a finding of guilt that the accused realized that the victim *might* not have been consenting. In *Wozniak and Pendry*, Bray C.J. held that:

> Logically, perhaps, *mens rea* in general and *mens rea* by recklessness in particular should be the same concept no matter what the crime. This, however, is not always so. And there is a difference, it seems to me, between foresight of the future consequences of an act about to be committed and belief in a present state of facts . . . the requirement of a belief in the probability of non-consent, as opposed to whatever degree of possibility is involved in the word "might" has never, as far as I can see, been held to be a necessary ingredient of rape and it is implicity excluded in all the formulations I have been able to discover. No doubt fantastic or remote possibilities of non-consent would not normally enter a man's mind in such a situation, nor do I think they would be regarded by a jury as fairly falling within the word "might". And a belief in consent is not inconsistent with preliminary doubt resolved after deliberation.[124]

Furthermore, the English Court of Appeal in *Pigg* held that "on any view of the word 'reckless' it seems to us that it clearly includes a case where the man appreciates the possibility that the woman may not be consenting and, nevertheless, goes on . . . ."[125] It seems, therefore, on the basis of existing fragmentary and most casually reasoned case law, that the accused will be found guilty of rape if, all other criteria for responsibility being present, he foresaw that the victim might not be consenting or the possibility that the victim did not consent, with the proviso that fanciful or remote doubts must be regarded as excluded. Belief and foresight are always a matter of fine degree and, with Lords Reid and Hailsham,[126] the use of such

123. *Supra*, notes 113, 114.

124. *Wozniak & Pendry*, *supra*, note 98 at 74. I am grateful to my colleague, Mr. W. B. Fisse, for the following point: "As a matter of policy, it is far from clear why any material distinction should be drawn between foresight of future consequences and belief as to present facts; recklessness as to present facts in murder (as where D, a shooter, is reckless as to an object being an animal or a human being) now appears to require realization of likelihood or probability."

125. *R.* v. *Pigg*, [1982] 1 W.L.R. 762 at 769, (C.A.).

126. See, *supra*, note 117 for reference to the views of Lord Reid, quoted with

words as "might" and "possible" are as far as it is necessary or desirable to go in the instruction of a jury. Moreover, whatever formula is chosen to express to the jury the minimum degree of foresight of risk required, it must be flexible enough to allow the jury to take into account its overall assessment of the *nature* of the risk concerned. As Glanville Williams pointed out recently, "the law is interested not only in the degree of probability of the consequence but in the magnitude of the calamity if it occurs."[127] Indeed, it is not unreasonable to suggest that the question of the degree of the risk involved is wholly swallowed by the assessment of the justification for running that risk. Smith has remarked that:

> If the risk is unjustifiable, that should be enough and it confuses the issue to go on to inquire whether it is also "substantial", for that is a matter which will usually have already been taken into account in deciding whether it was justifiable. Where the conduct has no social utility whatever, it is submitted that any perceptible degree of risk is unjustifiable. For example, a bank robber would not be justified in taking any risk with the lives of innocent persons in order to achieve his ends, however slight that risk may be.[128]

It is sometimes said that the court should look at all the facets of the situation in order to balance the social value in taking the risk against the social harm of the danger inherent in the risk.[129] It is obvious that the degree of risk is only one part of that equation.[130] This is usually illustrated by examining variations of a case in which a doctor operates on a patient with some foresight that the death of the patient, due to the operation, is possible/probable/virtually certain, but yet the operation is, to a degree, necessary to preserve the patient's life/health/ability to play the violin.[131] The flexibility

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approval by Lord Hailsham in *Hyam*, [1974] 2 W.L.R. 607 at 620.

127. Glanville Williams, *supra*, note 107 at 192. See also Griew, *Reckless Damage and Reckless Driving: Living with Caldwell and Lawrence* [1981] Crim. L.R. 743 at 749.

128. See, *supra*, note 104 at 447. See also Glanville Williams, *supra*, note 15 at 73 and Note, *Recklessness and Intoxication in the House of Lords* (1981), 32 N. Ire. L.Q. 373 at 380-381. Colvin, *supra*, note 82 at 352 states that "[t]he propriety of risk-taking has to be assessed by reference to the ends sought. This is true of recklessness in general. With more closely defined actions, however, it will be an exceedingly rare case in which justifiability is an issue of any significance." In short, the two are so conflated that the issue is either degree (Colvin) or justifiability (Smith).

129. An example is Howard, *supra*, note 19 at 356-357.

130. Howard, *id.* at 357.

131. See, for example, Howard, *ibid;* Stuart, *supra*, note 25 at 166-167; Gordon,

of this concededly objective part of the test for recklessness, depending as it does on so many factors peculiar to the individual case,[132] is built in so that the letter of the law may not defeat the execution of socially defensible policy. Despite the fact that the multifactoral approach precludes more than the most general of discussions of recklessness as to the consent element of rape, it also opens up a multi-factoral analysis of particular cases and classes of cases. All likely situations fall into a class in which sexual intercourse with another person takes place and almost all of these cases will involve situations where, because of the spouse exemption, the sexual intercourse is extramarital. Moreover, the central case will usually involve a situation where there is inadequate evidence of the use of force or threats, for, oddities like the incredible story in *Morgan* aside, the accused will be hard put to maintain a defence based on belief in consent if he thought it necessary to procure it by coercive means.

Examination of the social utility of such behaviour reveals a crucial ambiguity in the notion of recklessness. Does one examine the social utility of the behaviour on the facts as the accused believed them to be, does one examine it on the facts as the ordinary man would have believed them to be, or does one examine it on the facts as they turned out to be? In general in the context of rape, the perspective on which the facts are examined may make a startling difference; given the options listed above, the examination could be of the social utility of extramarital sexual intercourse, that act in the context that the other might not have consented, or rape simpliciter, respectively. There has not been an answer to this conundrum.[133] It is submitted that one cannot simply look to the facts as they were. Since, by definition, each situation involves the fact that sexual intercourse occurred without consent, the facts as they were would

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supra, note 85 at 388; Trieman, *supra*, note 25 at 340. Also see, *supra*, note 104 at 447.

132. See, for example, Stuart, *id.*, 167; Treiman, *id.*, at 335ff; Note, *The Reckless Rape* (1976), 18 Crim. L.Q. 418 at 419-420.

133. There has been a wide range of views expressed on this point. The view which seems prevalent in England is that the assessment of degree and justifiability should be made objectively but by reference to the perceptions of the actor: see, for example, Law Commission Report No. 89, *supra*, note 109 at para. 65, and Griew, *supra*, note 127 at 749. Treiman, *supra*, note 25 at 321-322, vacillates between the actor's knowledge and what a reasonable person would have known, and at 362ff argues that *degree* depends upon the actor's perception, but *justifiability* does not. By contrast, Howard, *supra*, note 19 at 357-360, appears to be of the opinion that the whole inquiry does not depend on the individual perception of the actor.

overwhelm the mental element to such a degree that de facto absolute liability would result. Equally, it would be absurd to rely simply on the facts as the accused believed them to be, as the rapist's capacity for self-delusion is unparalleled.[134] Moreover, discussion of the social utility of extramarital sexual intercourse is hardly to the point in a case where there is, ex hypothesi, some risk that rape is involved.[135] Rather, it is submitted that what is required is that a balance be struck between, on the one hand, an objective assessment of the risk that the other is not consenting and the harm of the consequences of non-consent, and on the other hand, an objective assessment of the social value of the disregard of that risk, *taking into account* what an ordinary person *in the position of the accused* would have thought.

The fact that consideration of the social harm of having intercourse with another person without that person's consent has a place in this proposed balance has led some to ignore the matters of the risk and the possible social value of its disregard in some circumstances. The fact that *some* possibility of intercourse occurring without the consent of another objectively exists has been permitted to blot out the nature of the inquiry, and to obscure the difference between the policy-based flexibility of this arm of recklessness and the view that the accused must be judged solely upon the facts as they actually are. A regrettable example occurred in *Leary* when Dickson J. stated that:

> When the risk is substantial and unjustifiable, proof of recklessness necessary to constitute the mental element essential to criminal responsibility may be readily satisfied. This is exemplified in the crime of rape. The harm to be anticipated from acting upon the mistaken belief that the woman is consenting is very great whereas that which may be lost in failing to act is slight. The risk then is both substantial and unjustifiable.[136]

With respect, it is submitted that this passage may be an accurate description of the majority of cases, but it is unsound. If the objective element of recklessness so easily concludes the inquiry, then the subjective element of foresight becomes a formality and the process becomes indistinguishable from the imposition of absolute

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134. See, for example, Clark and Lewis, *Rape: The Price of Coercive Sexuality* (the women's press, 1977) at 102-103.

135. Though that temptation has proved too much for some. See, *infra*, notes 139-144, 254ff.

136. *Leary*, 33 C.C.C. (2d) 473 at 486.

liability. Moreover, the formula dictates that the balance is always in favour of inquiry because the risk is always great and unjustifiable. The argument proceeds by its bootstraps and ignores the variety of possible experience, with the varying risks involved in them. As Dahlitz has pointed out, the degree and justifiability of risk may vary widely from the case where the accused entered the victim's home as an intruding stranger to the case of courtship where the issues turn on the degree of permitted intimacy.[137] In the former case, the risk is high and unjustifiable, but in the latter, "a delicate personal assessment is involved which, in the ordinary course of events, should not be subject to the scrutiny of the criminal law."[138]

Nevertheless, the result of concentrating upon the nature of the social harm involved to the exclusion of other matters has led a number of people to advocate that, in all cases, the male has a duty to inquire as to consent, and failure to do so should result in a presumptive finding of recklessness. In *Morgan,* Lord Cross remarked that:

> There is nothing unreasonable in the law requiring a citizen to take reasonable care to ascertain the facts relevant to his avoiding doing a prohibited act. To have intercourse with a woman who is not your wife is, even today, not generally considered to be a course of conduct which the law ought positively to encourage and it can be argued with force that it is only fair to the woman and not in the least unfair to the man that he should be under a duty to take reasonable care to ascertain that she is consenting to the intercourse and be at the risk of prosecution if he fails to take such care.[139]

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137. Dahlitz, *supra,* note 4 at 19-20.

138. *Id.,* at 20. See similar views expressed in Note, *supra,* note 132 at 420, and Note, *supra,* note 104 at 448. The former states that: "Similarly, sexual intercourse with a female person may be a risk-creating activity if the circumstances (such as the consumption of alcohol, a woman picked up at a bus-stop, a husband with a strange story of his wife's sexual proclivities, or whatever other circumstances the facts disclose) are such that not to direct one's mind to the risk that she is not consenting is, in fact, a mens rea sufficient to support a rape conviction."

139. *Morgan,* [1975] 2 All E.R. 347 at 352. Contrast the opposite, yet far less widely repeated, opinion of Lord Fraser at 383, where he states that: "No doubt a rapist who mistakenly believes that the woman is consenting to intercourse must be behaving immorally by committing fornication or adultery. But these forms of immoral conduct are not intended to be struck at by the law against rape; indeed they are not now considered appropriate to be visited with penalties of the criminal law at all."

The most eloquent advocate of an advertence requirement is Pickard, who says of the accused that:

> He is about to engage intentionally in the specific act which can in itself be harmful and whether or not the act is harmful in any particular instance cannot be determined without reference to the world outside him. That is sufficient reason to require him, as an initial matter, to inquiry into consent before proceeding . . . There can be no doubt that it is a major harm for a woman to be subjected to non-consensual intercourse notwithstanding that the man may believe he has her consent. There can be little doubt that the cost of taking reasonable care is insignificant compared with the harm which can be avoided through its exercise; indeed, the only cost I can identify is the general one of creating some pressure toward greater explicitness in sexual contexts. . . considering the disparate weights of the interests involved, a failure to inquire carefully into consent constitutes, in my view, such a lack of minimal concern for the bodily integrity of others that it is good criminal policy to ground liability on it.[140]

The language of deemed or presumptive fault could hardly be more clear. In fairness to Lord Cross and Pickard, it should be pointed out that they were speaking of the requirement of advertence in the context of the defence of honest and *reasonable* mistake.[141] The language of both is precisely apposite to the question of presumptive recklessness, but it is submitted that their arguments are misconceived. The short answer to them is that, in the past, the law punished women complainants for their unconventional sexual lifestyles by refusing to convict those who had attacked them, on the ground that, because of her lifestyle, the woman had asked for it. And now we are, apparently, urged to punish men for their unconventional sexual lifestyles by sending them to prison on the ground that, because of their lifestyles, which are unconventional only in the sense that they involve extramarital sexual intercourse, they were "asking for it". That logic carries its own refutation.

It has already been pointed out that a flat requirement of advertence cuts across the very question at issue, that is, the assessment of the culpability of the accused. The assumption upon which the requirement of advertence is based is that the failure to inquire renders all who fail sufficiently culpable to ground responsibility for rape. This assumption ignores the variability of

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140. Pickard, *supra*, note 17 at 76-77.
141. *Supra*, notes 63-77.

human behaviour. As Dahlitz points out, the assumption is not true in all cases.[142] If the assumption is not true in all cases, then what is its justification[143] and, if the assumption is true in all cases, what is the objection to leaving it to the jury? However, Pickard is of the opinion that human sexual behaviour is not a complex interaction, as follows:

> The safety of driving or construction work depends on myriad circumstances, any one of which might ultimately turn out to be relevant, some of which are difficult to ascertain, and most of which are susceptible to unexpected, instant alteration at any time. As a result, even an actor who has focused his mind for the moment on the question of safety cannot be said to have had, because of that, a meaningful opportunity to avoid harm . . . The inquiry he must undertake [in the context of rape] is simple; a single fact has been isolated and declared legally relevant to the doing of a single, temporally and spatially finite, intentional act. Consent is a matter of present fact, not of potential future consequences. There are only two legally relevant possibilities: consent is given or it is not. There is a discrete method, available to virtually everyone, of clarifying any ambiguities: actual verbal inquiry. And the one person who possesses the necessary information is, after all, right there. In such circumstances, there can be no unfairness in requiring the actor to inquire into consent with the degree of care of which he is personally capable.[144]

There are at least two major objections to this line of reasoning. First, at what point in the transaction must the inquiry be made? Suppose, as was the case in *Mayer* v. *Marchant,* that the accused has addressed the problem at some time in the past and believes that, so long as the same circumstances recur, the consent is given.[145] Must he, instead, inquire on each occasion? When on each occasion? Surely it is too much to expect a careful inquiry right at the moment of penetration. But that is the legally relevant moment, and it is the criterion of legal relevance which Pickard emphasizes. In addition, there is authority for the proposition that the victim is entitled to change her mind once

142. *Supra,* notes 137, 138.

143. Treiman, *supra,* note 25 at 350: "There is a common sense difference between an ordinary deviation and a gross deviation, which might be best expressed as being the distinctions among a fool and a damned fool, but essentially the difference represents a value judgement which cannot be reduced to a legal formula."

144. Pickard, *supra,* note 17 at 80-81. Similarly at 83: "In rape, we are dealing with the kind of mistake that results from the complexity of our endeavours and inevitable human frailty, but with an easily avoided and self-serving mistake produced by the actor's indifference to the separate existence of another."

145. *Supra,* notes 69-76.

sexual intercourse has begun, especially if more than the initial penetration occurs.[146] Must the male continue to ask whether the female consents throughout the entire transaction? The requirement is absurd. Either one concentrates on the legally relevant moment of penetration, in which case sexual intercourse must be continually punctuated by questions and answers, or one concentrates on some point in the process leading up to the act of intercourse, in which case, if the female changes her mind, the inquiry is irrelevant anyway. Equally, why do they not propose a requirement that the female manifest her consent prior to intercourse? Second, it is surely a strange view of the sexual relationship between two persons to see that relationship as being less complex than the act of driving a car. To impose a requirement of advertence which cut across the basic requirement of culpability is to ignore the complexities and subtleties of human sexual interaction. The better view is that expressed by Toner, as follows:

> The exchange of cues between a man and a woman involved in a rape is undoubtedly significant to the outcome of any subsequent trial. The closer their prior relationship, the hazier these cues are likely to be. In the early stages of the encounter, it may well be that the victim's behaviour could be interpreted as coyness, mild resistence, or subdued fear. In this extraordinarily complex and confused interaction, it is likely that the circumstances and her own conditioning are likely to limit severely the cues she is able to give, so much so that her behaviour may later seem mystifyingly ambivalent.[147]

There are important differences between obvious consent, based on a choice for intercourse, and reluctant tolerance which shades into

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146. See *Salmon*, [1969] S.A.S.R. 76; *Mayberry*, [1973] Qd. R. 211; *Kaitamaki*, [1980] 1 N.Z.L.R. 59. The last decision is discussed in Note, *supra*, note 86 at 438-441.

147. Toner, *supra*, note 4 at 63; see also *id.* at 67. See also Note, *supra*, note 2 at 455, quoting the similar opinion expressed in the Heilbron Report, *supra*, note 13 at 2; Note, *supra*, note 86 at 436, quoting Honore, *Sex Law* (Duckworth, 1978) at 77; and Dickson J. in *Pappajohn* 52 C.C.C. (2d) 481 at 505-506:

> Whether . . . [sexual intercourse] . . . is criminal depends on complex considerations, since the mental states of both parties and the influence of each upon the other, as well as their physical interaction, have to be considered and are sometimes difficult to interpret — all the more so, since normally the act takes place in private; there can be many ambiguous situations in sexual relationships; hence, however precisely the law may be stated, it cannot always adequately resolve these problems; in the first place, there may well be circumstances where each party interprets the situation differently, and it may be quite impossible to determine with any confidence which interpretation is right.

passive nonconsent, and the way in which those conditions are made manifest and are perceived by the accused in any given situation are also significantly different. The presence or absence of consent cannot be determined by a single verbal inquiry. Those who ignore this view of sexual relationships do so because their preoccupation with the harm that is actually caused leads them to a perspective based on absolute liability, masquerading as presumptive fault of some kind.

The other factor in the recklessness formula is the possible social value inherent in disregard of the risk found to be present. Most commentators assume either that there is no such social value, or that it is so minimal as to be negligible. In most individual cases that will be so. But that does not elevate a rule of thumb into presumptive recklessness. Consideration of policy-based, flexible social value must be grounded in general concerns and not influenced by myopia in a particular case. For example, it should be clear from the discussion above that, in any case, attention should be paid to the question of whether it is sensible, as a general rule, to require all men and all women in similar circumstances to inquire as to consent, in light of defensible legal attitudes to extramarital sexual relationships. It may be the case that it is not defensible social policy or defensible legal theory to require constant questioning or affirmation of consent during the act of sexual intercourse.

Pickard is of the opinion that the only cost of a rule of inquiry is the creation of a pressure toward greater explicitness in sexual relationships.[148] Lord Cross is of the opinion that such a rule would reflect social disapproval of extramarital sex and, hence, would discourage it. For what it is worth, I think that Lord Cross is right. The cost of such a policy, designed to create honest sexual relationships, would be the stifling of a form of human interaction that is not sanctioned by the formalistic blessings of the churches or the state. The purpose of criminal law rules is the discouragement of certain behaviour and the encouragement of others only indirectly. The primary effect of an inquiry rule would be the discouragement of sexual behaviour in general, with the encouragement of explicitness as a marginal effect only. There is little sexual excitement or romance for either sex in the constant threat of rape. Nor are people particularly good at being explicit about sexual relationships, a fact that has nothing at all to do with the law. Moreover, one might ask whether the criminal law is the appropriate medium within which to enforce a social policy

148. Pickard, *supra*, note 17 at 77.

of good and accurate sexual communication.[149] Finally, such a policy may not be entirely fair. Clark and Lewis state that "it would be both unreasonable and unrealistic to prohibit all forms of coercive sexual contact while any vestige remains of the old structures and their attendant ideology. So long as men must bargain for sex, it would be unjust to prohibit all coercive strategies. But clearly there must be limits, and those limits must be agreed upon by both men and women."[150]

The sexual relationship, considered as an individual, social, or political relationship, is just not as simple as driving a car. There is more to social policy than the case at hand, and that is why the formula exists. Those who would impose an inflexible rule must explain why they would give power to the judges, rather than the juries, and why they would seek to foreclose consideration of social policies beyond their own conception of sexual politics.[151] It may be that any given jury will regard the objective criterion of recklessness as weighing against an accused who claims that he did not advert at all to the question of the consent of the victim. Equally, a jury may regard it as entirely reasonable in any given case that the accused did not turn his mind to the issue. There is no warrant to foreclose the issue by the creation of an artificial rule. Nor is there any warrant for the view that rape victims will receive less than just treatment, unless one is prepared to maintain that juries will apply the criterion in an unjust manner. Even if that is the case, it is an entirely different problem and will not be cured by the ad hoc transfer of power to a judge who could be equally prejudiced.

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149. Note, *supra*, note 86 at 437:

> There is no moral consensus on this question and the criminal law should therefore be reluctant to intervene . . . [It] would profoundly affect the politics of sex and undercut established understandings as to permissible and impermissible conduct. One need not travel all the way with Jeremy Bentham or Herbert Marcuse to condemn such liability and indeed the decision in *Pappajohn* itself is an expression of surplus repression rather than of fundamental principle.

150. Clark and Lewis, *supra*, note 134 at 182.

151. Thus the characterization of sexual relationships by those who would require advertence: Dahlitz, *supra*, note 4 at 24, describes the act of sexual intercourse as "hazardous"; Mewett thinks that such an activity carries with it a "high degree of risk"; Note, *supra*, note 132 at 419; Pickard, *supra*, note 17 at 88-89, *contrasts* possession and sexual intercourse by describing the former as "essential, unavoidable, ubiquitous, and ordinarily harmless" — presumably the latter is not! Pickard's view is properly criticized by Colvin, *supra*, note 82 at 360. This author regards such a characterization of sexual behaviour simpliciter as totally unacceptable.

(iv) *The Question of Foresight*

The issue of the accused's advertence to the possible nonconsent of the victim in the context of recklessness has two facets. Previous discussion in this article has concerned the question of whether or not failure to advert to the matter of consent is or should be conclusive evidence of the recklessness of the accused. It is argued that failure to advert should not be accepted as conclusive in the objective phase of the recklessness inquiry. The issue of advertence is also of significance in the subjective aspect of the recklessness inquiry, that is, in the examination of the state of mind of the actor himself. Here the question is not the objective one of whether the failure to advert will always mean that the accused is reckless, but the subjective question of whether failure to advert will always mean the accused is *not* reckless. It is easy to confuse the two questions, but there is a significant difference between them.[152] The problem arises in dealing with these questions because the traditional formulations of recklessness require proof that the accused actually foresaw the risk and consciously decided to disregard it.[153] Howard, for example, states that "D cannot disregard a risk until he knows about it, which means until he has a belief on the point which coincides to a sufficient degree with the facts . . . The requirement of advertence in recklessness means that D is entitled to be judged on the facts as he believed them to be if the actual facts are less favourable to him". [154] Moreover, it has been forcefully argued that the requirement of advertence is necessary to distinguish recklessness from negligence.[155]

It is clear that the credible assertion, by the accused, of an honest belief in consent will negate recklessness, even if that belief is unreasonable. Moreover, if the requirement of advertence is to be strictly adhered to, then an assertion by the accused that he did not form an opinion on the issue will, if believed, also negate recklessness. It is hardly surprising, then, that those who would

152. It is submitted that the two questions are confused by Wells in *Swatting the Subjectivist Bug* [1982] Crim. L.R. 209 at 212-3 and Lord Lane C.J. in *Pigg, supra,* note 125 at 769.

153. See, for example, the formulae quoted in notes 108 and 109, *supra.*

154. Howard, *supra,* note 19 at 358. See also Packer, *The Model Penal Code and Beyond* (1963), 63 Col. L.R. 594 at 602-603; Stuart, *supra,* note 25 at 166, 167, 186; Gordon, *supra,* note 85 at 355; Treiman, *supra,* note 25 at 351, 352; McEwan and Robilliard, *supra,* note 95 at 268-269.

155. Treiman, *id.,* at 351. See also Hall, *Negligent Behaviour Should Be Excluded From Penal Liability* (1963), 63 Col. L.R. 632 at 639, 640..

lessen the standard of criminal responsibility for rape focus an attack on the requirement of advertence. If successful, it would remove a rule which is felt to be too favourable to the accused and, by blurring the line between negligence and recklessness, it would inject a desired element of objective liability into the criterion of guilt.

In modern criminal law there has been a marked tendency to blur the crucial threshhold of responsibility. Howard makes the point neatly when he says that ". . .malice has been replaced by intention, intention has been broadened to include both purpose and belief, and now recklessness is replacing parts of intention."[156] Very recent attacks on the requirement of advertence have continued the trend by attacking the notion of subjective culpability and broadening the concept of recklessness to take in parts of negligence. By far the most important example of this is contained in the recent decisions of the House of Lords in *Caldwell* and *Lawrence*.

In Caldwell,[157] the accused was charged inter alia with damaging property with the intent to endanger life or being reckless whether or not life would be endangered. He had set fire to a hotel in a drunken effort at revenge on the hotel owner. He claimed that he was drunk at the time and that the thought that there might be persons in the hotel whose lives would be in danger had not crossed his mind. Lord Diplock stated in the course of his reasons that:

> "Recklessness" as used in the new statutory definition of the mens rea of these offences is an ordinary English word. It had not by 1971 become a term of legal art with some more limited esoteric meaning than that which it bore in ordinary speech — a meaning which surely includes not only deciding to ignore a risk of harmful consequences resulting from one's acts that one has recognized as existing, *but also failing to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was* (emphasis added).[158]

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156. Howard, *supra*, note 19 at 355. See also Glanville Williams, *supra*, note 107 at 191: "The judges created the presumption of intent from probability for the same reason as they have manipulated language in other areas of the criminal law: their desire to procure and uphold the conviction of persons who were public dangers or public nuisances. When a crime required intention and the judges thought this too narrow, they bent the notion of intention."

157. *Supra*, note 94.

158. [1982] A.C. 341 at 353-354.

In *Lawrence*,[159] the accused was charged with causing death by reckless driving. The direction to the jury on recklessness came eventually to the House of Lords, where Lord Diplock substantially reaffirmed the definition of recklessness found in *Caldwell* by saying that:

> Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting "recklessly" if before doing the act, he either fails to give any thought to the possibility of there being any such risk or having recognized that there was such a risk, he nevertheless goes on to do it.[160]

This definition of recklessness, which must be taken as representing the view of the House of Lords, has provoked much academic controversy.[161] There has been much informative disputation about whether or not Lord Diplock's definition represents a new concept of recklessness, whether or not the definition has rendered the concept of recklessness "objective" in nature, and, if so, whether or not that is an appropriate direction in which to move and what its consequences are for criminal law theory. There is, of course, the additional question of whether Canadian courts will follow the English developments and, if so, which of the developments it will follow.

It is not the intention of this article to deal with these matters in detail. It is sufficient to point out that, whether or not the definition is a departure from the previous situation,[162] Lord Diplock has

159. [1982] A.C. 510, [1981] 2 W.L.R. 524, [1981] 1 All E.R. 974.

160. [1981] 2 W.L.R. 524 at 535.

161. See McEwan and Robilliard, *supra*, note 95; Glanville Williams, *Recklessness Redefined* (1981), 40 Camb. L.J. 252; Note, *supra*, note 128; Griew, *supra*, note 127; Glanville Williams, McEwan and Robilliard, *supra*, note 121; Glanville Williams, *Divergent Interpretation of Recklessness* (1982), 132 New L.J. 289, 313, 336; MacKay, *Some Developments in the Law of Rape* (1982) 146 J. P. 494; Syrota, *A Radical Change in the Law of Recklessness*, [1982] Crim. L.R. 97.

162. It probably is a change; see, for example, the decisions in *Cunningham*, [1957] 2 Q.B. 396; *Lamb*, [1967] 2 Q.B. 981; *Venna*, [1976] Q.B. 421; *Parker*, [1977] 2 All E.R. 37; *Stephenson*, [1979] Q.B. 695; *Flack* v. *Hunt* (1980), 70 Cr. App. R. 51.

made it clear that, in his view, an accused may be reckless as to an element of an offence even if the thought of the risk involved has crossed his mind. That view is a significant departure from what the law has hitherto been thought to be and, since in some cases the accused will be found to be reckless even though the risk never entered his or her mind, culpability on the basis of recklessness may be assessed objectively. That is, it can be assessed without reference to the state of mind of the actor involved, but by reference to some standard that is external to the actor. The issues that are important for present purposes are, first, the exact meaning of the definition of recklessness and, second, the effect of its application to the law on the mental element of rape.

Prior to the English decisions regarding the traditional view, there had been some concern that the accused could only be found to be reckless if he or she had considered the matter and had decided to proceed anyway. That dissatisfaction was by no means confined to those who felt that the culpability element of rape was too favourable to the accused. Indeed, the cause of the unrest was the fact, as identified above,[163] that the requirement of advertence cuts across culpability in an artificial way. For example, Gordon argues that:

> Concentration on the concept of the subjective mental state may lead us to ignore the fact that severe moral condemnation is merited by a failure to foresee what any decent human being would foresee. Indeed, the callousness, ruthlessness and selfishness exhibited by such a failure may well be morally worse than the behaviour of someone who regretfully takes a calculated risk and does all he can to minimise that risk . . . as J. L. Austin put it, "We may plead that we trod on the snail inadvertently: but not on a baby — you ought to look where you're putting your great feet. Of course it *was (really),* if you like inadvertence: but that word constitutes a plea, which isn't going to be allowed, because of standards. And if you try it on, you will be subscribing to such dreadful standards that your last state will be worse than your first."[164]

This dissatisfaction with the requirement of advertence found expression in three ways. First, there was a marked tendency to

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163. See, *supra,* notes 68, 142.

164. Gordon, *supra,* note 85 at 384-385, quoting from Austin, *A Plea For Excuses,* reprinted in White, ed., *The Philosophy of Action* (Oxford, 1968) 1 at 35. See, for similar examples of restiveness about the advertence requirement, Fletcher, *supra,* note 19 at 711-712; and Glanville Williams, *supra,* note 15 at 75.

resort to the still vague and developing concept of wilful blindness in order to find a form of culpability in advertence.[165] Second, there has been a degree of flirtation with the slippery distinction between what the Crown must prove and the way in which the Crown may prove it. Third, there has been an exploration of the limits of the notion of advertence.

Leaving aside, for the moment, the utility of the concept of wilful blindness, discussion turns to the qualification upon the requirement of advertence attempted through the use of the manner of proof. The matter was expressed well by Martin J. A. in *Buzzanga and Durocher,* when he said that:

> Recklessness . . . requires actual foresight on the part of the accused that his conduct may bring about the prohibited consequence, although I am not unmindful that for some purposes recklessness may denote only a marked departure from objective standards . . . . Since people are usually able to foresee the consequences of their acts, if a person does an act likely to produce certain consequences it is, in general, reasonable to assume that the accused also foresaw the probable consequences of his act and if he, nevertheless, acted so as to produce those consequences, that he intended them. The greater the likelihood of the relevant consequences ensuing from the accused's act, the easier it is to draw the inference that he intended those consequences. The purpose of this process, however, is to determine what the particular accused intended, not to fix him with the intention that a reasonable person might be assumed to have in the circumstances, where doubt exists as to the actual intention of the accused.[166]

Hence, and despite the ghost of *D.P.P.* v. *Smith* lurking in the background,[167] the problem of the accused, who claims inadvertence in a situation in which the reasonable person could not have failed to consider the matter, is solved by saying that the claim will not be believed unless the accused can produce an explanation

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165. A particular example is to be seen in Pickard, *supra,* note 17 at 89. See also, *infra,* notes 189ff.

166. *Supra,* note 91 at 386-387. The point is very commonly made: see, for example, Glanville Williams, *supra,* note 15 at 76-77; Heilbron Report, *supra,* note 13 at paras. 53-56; Stuart, *supra,* note 25 at 162-163; Gordon, *supra,* note 85 at 374, 378-379, 386; Glanville Williams, *supra,* note 161 at 258; Wasik and Thompson, *"Turning A Blind Eye" As Constituting Mens Rea* (1981), 32 N. Ire. L.Q. 328 at 338-340; Colvin, *supra,* note 82 at 369; Treiman, *supra,* note 25 at 357, 358; Glanville Williams, *supra,* note 161 at 289.

167. [1961] A.C. 290, (H.L.) The spectre of this case has haunted most of the discussions cited heretofore.

of the individual case that will destroy the normal process of inference. The focus of the inquiry is still the state of mind of the actor and not what the reasonable person would have done, but the process of proof superimposes an objective criterion as a matter of credibility. Glanville Williams neatly points to the distinction as the difference between the normative "he would have foreseen it" and the factual "he must have foreseen it".[168] It is obvious, of course, that there is no rule in this, only the reassurance that the belief of the factfinder will necessarily bar the accused of an unmeritorious defence, a possibility that is apparently left open in the letter of the law.

Exploration of the notion of advertence has also proved useful in avoiding what are seen to be the injustices of the rule of advertence. The simple point is that the requirement of advertence need not be confined to the accused who actually thinks about the relevant matter at the relevant time. Rather, it is said that knowledge or awareness may also refer to knowledge which is stored in the brain and could be called upon if required.[169] Thus, "[w]e use the word 'knowledge' to include information that may be summoned to mind at will, or almost at will."[170] This concept was recently examined in some detail by Colvin, who said that:[171]

> Inquiry into experience of risk is still inquiry into the actor's own state of mind. It is directed towards a conclusion on what he knew and therefore could have brought to mind simply with some thought. An objection to this inclusion within the scope of recklessness would have to be based on some other ground than the principle of subjectivity . . . As long as attention is directed to the individual's own capacities and not those of some hypothetical "reasonable person", a judgment of fault can be made on the ground that he had a fair opportunity to think otherwise than he did. The major difficulty is not with culpability

168. Glanville Williams, *supra,* note 15 at 76.

169. See, for example, Stuart, *supra,* note 25 at 188; Glanville Williams, *supra,* note 161 at 289, col. 2-3; Syrota, *supra,* note 161 at 99-100; Colvin, *supra,* note 82 at 361, quoting *R.* v. *Murphy,* [1980] 2 All E.R. 325 at 328, in which it was said, "when one speaks of something which a person knows, is one referring to knowledge which is stored in the brain and available if called upon or to knowledge which is actually present because it has been called upon?" See also discussion in Wasik and Thompson, *supra,* note 166 at 331-332, of a distinction posed between "active" and "passive" knowledge; active knowledge is that in one's mind, passive knowledge is that which is temporarily forgotten but capable of recall.

170. Glanville Williams, *supra,* note 15 at 78. See also Duff, *Recklessness* [1980] Crim. L.R. 282 at 290-291.

171. Colvin, *supra,* note 82 at 361-363.

> itself but rather with sufficiency of culpability. Is the actor who experientially knew of a risk so culpable that he may justly be exposed to the penalties facing the actor who was conscious of the risk?[172]

Colvin concludes, however, that a compromise between the strict requirement of advertence and the vague,[173] open-ended notion of experiential knowledge is the preferred solution.

> A person should be held reckless if he unjustifiably takes a risk and either realizes that the risk is present or *realizes that others would think the risk is present*. Realization may occur at the time when the risk is taken or at some earlier point in the same transaction. Lack of awareness which is due to culpable cognitive impairment should not be a defence except for offences carrying a fixed penalty or involving an ulterior mental element.[174]

These two methods of expanding reckless culpability may, of course, be used together. The combination is made clear by Smith in his comments on a decision of the English Court of Appeal in *Bashir:*

> The approved test requires us to consider what he [D] would have thought if he had stopped to think. If, as the jury must be taken to have found on the judge's direction, any ordinary and reasonable man would have appreciated that there was a substantial risk that the girl was not consenting, the defendant also, *if he had stopped to think,* must have appreciated this, unless he was subnormal.[175]

It is only with this background information that the dispute concerning the meaning to be given to the decisions of the House of Lords in *Caldwell* and *Lawrence* can be understood. There can be no doubt at all that Lord Diplock has laid to rest the strict view that the accused cannot be reckless in the absence of a conscious advertence to the risk in question. The question is only as to how far beyond that strict requirement he has gone. Despite Colvin's espousal and defence of an intermediate position, it is submitted that Lord Diplock can only have had one of two alternatives in mind.

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172. Colvin, *id.*, at 363, 367-368. See also Glanville Williams, *supra,* note 161 at 261.

173. See, for example, Hall, *supra,* note 155 at 639-640. At 640: "A person either has that sensitivity or he lacks it. If he had normal sensitivity, presumably he would have expressed it in taking due care, especially because a collision also endangers his own life. If he lacks that sensitivity, he may be careless. To declare that a person had the competence to be sensitive to ordinary dangers is a tautology, since competence is or includes that sensitivity."

174. Colvin, *supra,* note 82 at 373.

175. Note, *Rape* [1982] Crim. L.R. 687 at 688-689.

The key lies in the proper interpretation of the word "obvious", in the phrase "obvious risk". If the word is to be interpreted as meaning "obvious to the reasonable person", or some other standard which is external to the accused, then Lord Diplock has clearly conflated negligence and recklessness. If, on the other hand, the word is to be interpreted as meaning "obvious to the accused had he or she thought about it", or some similar standard which focuses on the actor's mental capacities, then Lord Diplock has simply added, to the traditional definition of the advertence requirement, the interpretive flexibilities discussed above.[176] Academic opinion is divided on what the proper interpretation is.[177] It is sadly true that Lord Diplock has not pronounced clearly one way or the other, and support can be found in the relevant opinions for either proposition.[178] The position is also not clarified by subsequent developments in which the Court of Appeal appears to have decided that the meaning to be given to recklessness differs in *Caldwell* from that to be given in *Lawrence*.[179]

Leaving *Lawrence* and driving offences aside as special cases, it is submitted that the preferable interpretation is that which preserves the subjective view of recklessness but modifies it to soften the strict advertence requirement thought by many to have been indefensible.[180] In the absence of clear directions to the contrary, the interpretation which eliminates the previously clear distinction between subjective recklessness and objective negligence ought not to be regarded as having been swept away, and such a direction has not been clearly made.[181] Given the decision that the new formulation of recklessness applies to the rape offence,[182] the effect of this on the decision in *Morgan* must be discussed in order to state

176. This is the interpretation favoured after extensive analysis by Glanville Williams, *supra,* note 161 at, for example, 97.

177. Compare the optimistic interpretation of Syrota and Glanville Williams, *ibid,* with the pessimism of Griew, *supra,* note 127 and Smith [1981] Crim. L.R. 658-661, and the uncompromising objectivism in both theory and interpretation of McEwan and Robilliard, *supra,* note 95.

178. Glanville Williams, *supra,* note 161 at 290, col. 3.

179. See Note, *Road Traffic* [1982] Crim. L.R. 692, (*R.* v. *Madigan*).

180. Glanville Williams, *supra,* note 161 at 272; McEwan and Robilliard, *supra,* note 95 at 282-283; Syrota, *supra,* note 161 at 103.

181. See, for example, Wasik and Thompson, *supra,* note 166 at 338: "This is a policy matter of great importance for the criminal law, but the issue should not be baulked simply by running together the legal concepts of 'negligence' and 'recklessness'. They should not be construed so as to shade into or overlap each other in this way."

182. *R.* v. *Pigg, supra,* note 125; *R.* v. *Bashir,* [1982] Crim. L.R. 687.

the degree and justifiability of the risk involved, given the variety of the subjectivist position on the consent element in rape.

The first reaction of those who assumed or reasoned that the more objective interpretation of recklessness was, in fact, that *Morgan* had been overturned in this respect and, citing *Pigg*, that the minimum criterion for liability was an inquiry into the perceptions of the ordinary or reasonable person.[183] But this would surely be an odd occurrence: it would be strange indeed if the House of Lords directly contradicted such an important decision without mentioning the fact. Moreover, *Pigg* is of little assistance. The Court of Appeal in that case merely reproduced the ambiguous formulae from *Caldwell* and *Lawrence* without further explanation. If the problem is to be resolved, the position must be considered from first principles, as follows. An accused will either fall into the class of persons who adverted to the question of the risk of nonconsent, or will not. If the accused did advert to the risk and if all other aspects of the crime and recklessness are present, then he or she will be found reckless if the unjustifiable risk was disregarded. If, instead, the accused considers the risk and decides that there is none or that whatever risk there is is only fanciful, then, regardless of whether or not a reasonable person would have reached that same decision, the accused cannot be deemed reckless. Nor does the redefinition by the House of Lords affect that result.[184] However, if the accused does not advert to the risk which is found by some objective inquiry to exist, then the accused will be found reckless on the objective interpretation of *Caldwell* if the risk would have been obvious to a reasonable person, and he or she will be found reckless on the subjective interpretation if the jury is of the opinion that, had he or she adverted to the question, he or she would have seen the risk.

The matters which arise from this situation are best discussed in the context of a specific example. In *R.* v. *McEwan*, Mr. McEwan was charged with two counts of rape.[185] The complainant and her brother had gone to a party, and had entered a car with the expectation of being

183. See, for example, Cowley, *The Retreat From Morgan* [1982] Crim. L.R. 198 at 206; Wells, *supra*, note 152 at 214; MacKay, *supra*, note 161 at 146-147. McEwan and Robilliard, *supra*, note 95, escape by arguing, totally against all evidence, that recklessness is not sufficient mens rea for rape; that foresight of the possibility that the woman did not consent amounts to *intention*, not recklessness, and will suffice for conviction for rape, and, hence, *Morgan* is preserved, despite *Lawrence and Caldwell*.

184. See, for example, Glanville Williams, *supra*, note 161 at 313 col. 1, 336 col. 1-3.

185. *R.* v. *McEwan*, *supra*, note 49.

driven home. When the car suffered mechanical trouble, a second car stopped to assist and, as a consequence, the occupants of both cars went voluntarily to a house occupied by one of those in the second car. It was alleged that, during the drive to the house, the accused and three others raped the victim in the car. The accused was found not guilty of that rape by the jury, though the others were found guilty of various offences. Shortly after arriving at the house, the victim was allegedly raped by a number of men, including the accused, who was convicted of rape on this count. The accused said in his unsworn statements that:

> I never asked the girl if I could have intercourse with her, but the way she was lying in the car and in the bedroom, I thought she was willing. She wasn't crying or anything. She said she liked it in the car. She didn't say anything in the bedroom. It is all a bit confusing now, but if I knew she wasn't willing, I wouldn't have had intercourse with her. I just turned eighteen, and I'm not guilty.

Assuming that the story is credible enough that one can say that the accused did not intend intercourse without consent and did not have intercourse knowing that the victim did not consent, then the question of recklessness must arise. Did the accused advert to the question of consent? It is difficult to determine this from the statement given. He admits he made no inquiry. Let us assume that he did not advert, and that he supposed that she consented, although, in fact, she did not. On the objective view, he will be reckless if a reasonable man in his position would have foreseen the risk that she did not consent. On the subjective view, he will be found reckless if, had he given thought to the matter, he would have foreseen the risk that she did not consent. It is clear that, had he *actually* given thought to the matter and made an incorrect decision, the fact that he adverted would increase his credibility and, whether or not the decision was reasonable, would constitute no legal bar to his denial of mens rea. It should also be clear that the conflicting interpretations do not produce exclusive answers. Mr. McEwan's inadvertence may well be unreasonable on the facts, but there is in this no guarantee that, he had thought about the matter, he would have come to the reasonable conclusion. Equally, his inadvertence may be totally reasonable, but if he is a sensitive human being, it may well be that, had he considered the matter, he would have come to the unreasonable yet correct conclusion. Given the extent of possible overlap, it is difficult to avoid the conclusion that there may be little significant difference in practice between the two tests, particularly if one takes into account the notions of wilful blindness,

credibility, and experiential knowledge.[186] Furthermore, the overlap shows that, even if the objective view is preferred, recklessness does not *require* that the accused advert to the question of consent, for, if the inadvertence is reasonable, the accused cannot be found to be reckless. Finally, it should be noted that, if the objective interpretation prevails, it leads to the odd result that the accused, who considers the risk and concludes, unreasonably, that there is no risk or that it is merely fanciful, is not reckless, whereas the accused who unreasonably does not consider the risk will be found reckless. As Colvin has pointed out, since so much turns on the matter of advertence to risk, it may be that whether the subjective or objective interpretation is adopted, the courts will be tempted to reject a superficial inquiry as constituting no inquiry at all.[187]

IV. *Intermezzo*

The objective position on the case of an accused who is found to have had sexual intercourse with another without the consent of that other, but who pleads in defence that he thought that the other consented to the sexual act, is that the accused must assert a mistaken belief in a set of facts which, if true, would render the behaviour innocent of criminal liability and, crucially, such a mistake must be objectively reasonable. It is certain that the accused will bear the evidential burden of going forward with that defence in the demonstration of a reasonable doubt on the matter and it is quite possible that the accused will bear the burden of proof of that defence on the balance of probabilities. The emphasis of such a defence is on the reasonableness of the mistake regarding consent, and although the exact meaning of reasonableness has been deferred for subsequent discussion, it is clear that reasonableness as a requirement functions principally as a bar, in the sense that it confers additional power on the judge to control the fact-finding function of the jury. Moreover, while the traditional view of the defence of reasonableness restricts its availability to those who have adverted in some fashion to the fact at issue, it has nevertheless been pointed out that such a requirement is objectionable in theory and whimsical in application. By contrast, the subjectivist position on culpability has been seen to rest on the concept of recklessness with regard to the nonconsent of the other person. That concept has two

186. The point is most strongly made by Colvin, *supra*, note 82 at 359-360, quoted, *infra*, at note 196.
187. Colvin, *id.*, at 367.

parts. With respect to the first part, it has been argued that the jury should be told, on present law, to find the accused reckless if there was a possibility that the other person might not have consented. The jury is to bear in mind the proviso that remote or fanciful possibilities ought not to be considered, and must consider the matter in the context of balancing the social value involved in taking the risk that was found to exist against the social harm of the danger inherent in the risk. The second part of the concept is open to disputation, but it has been submitted that the accused will be found to be reckless if he foresaw that the other person might not have been consenting, given the conditions described above, or if he did not advert to an obvious risk that the other was not consenting, a risk which, if and only if he had adverted to the matter, he would have foreseen. However, a belief on the part of the accused that the other person was consenting will mandate acquittal, no matter how unreasonable such a belief may have been.

It may be remarked at this point with some justice that, in practice, the difference between the two positions may be more apparent than real. The criterion of recklessness may be seen to converge in a number of respects with the defence of reasonable mistake of fact. First, the dilution of the requirement of advertence for a finding of recklessness has obscured the distinction between recklessness and negligence simpliciter. Second, that dilution has involved the incorporation, into the concept of recklessness, of a concept which resembles closely the still undeveloped notion of wilful blindness. The use of that concept or, even more dangerous, the interaction of that concept with the grey area between matters of proof and matters of legal requirements,[188] or with the extended definition of recklessness, may mean that any distinction between objective and subjective culpability will be obscured forever. It is beyond the scope of the present discussion to deal in detail with the slippery slope of wilful blindness, not least because its development is retarded and its application erratic. Like many erosions of basic principle, it is rooted in decisions which were made in an effort to

188. An excellent example is provided by Griffiths (1974), 60 Cr. App. R. 14 at 18:

> To direct the jury that the offence is committed if the defendant, suspecting that the goods were stolen, deliberately shut his eyes to the circumstances as an alternative to knowing or believing the goods were stolen is a misdirection. To direct the jury that, in common sense and in law, they may find that the defendant knew or believed the goods to be stolen because he deliberately closed his eyes to the circumstances is a perfectly proper direction.

circumvent what is regarded as an unmeritorious defence, and to convict a person who would, on strict principle, be innocent. Hence, it is a matter of little surprise that the doctrine has found most of its utility in the expansion of already widely expanded offences which, as a matter of political policy, have been enacted to deal with incipient criminality. The most obvious examples are offences involving the possession of drugs or stolen goods and, even in the latter case, the extension of culpability to wilful blindness has been controversial.[189] The definition of wilful blindness should be that proposed by Glanville Williams, as follows:

> A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact: he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice.[190]

The crucial point of such a definition is the requirement that the accused adverted to the matter at issue at some point before wilfully closing his or her eyes.[191] It is, however, very clear that the doctrine of wilful blindness can be used illicitly outside the concept of subjectivity in order to convict those who fail some duty of reasonable investigation,[192] and that the "evidence tending to show wilful blindness could just as easily be interpreted as showing only negligence."[193] The limited history of the judicial approach to the concept of wilful blindness demonstrates the dangers of its

189. See, for example, Glanville Williams, *supra,* note 15 at 85-87; Mewett and Manning, *supra,* note 32 at 116-119; Comment, *Willful Blindness As A Substitute For Criminal Knowledge* (1977), 63 Iowa L.R. 466; Wilson, *The Doctrine of Wilful Blindness* (1979), 28 U.N.B.L.J. 175; Wasik and Thompson, *supra,* note 166.

190. Glanville Williams, *supra,* note 95 at 159. See also Wasik and Thompson, *id.,* at 329-330, in which it is said that "it is thus central to the idea that D's 'blindness' is induced *deliberately,* which distinguishes his mental state from commonplace ignorance or inconsistency of belief. Herein lies the root of D's fault or culpability (emphasis in original)."

191. Wasik and Thompson, *id.,* at 337, (criticizing *Parker, supra,* note 162), and at 340.

192. Comment, *supra,* note 189 at 471: "Those American courts that have accepted the concept of wilful blindness are themselves divided on the question whether such blindness constitutes actual knowledge or instead some lesser degree of knowledge . . . the vast majority would rule that it is rather only a substitute for actual knowledge."

193. *Id.,* at 477, and also at 482-483. For case examples of the dangers in three legal systems, see *Parker, supra,* note 162; the trial judges' directions reversed in

development.[194] When the possibilities of the interaction between the extended definition of recklessness and the various devices used to dilute it are considered in conjunction with the near certainty that the concept of wilful blindness will be expanded judicially, the scope for the objective judgment of accused rapists becomes unlimited.[195]

The discussion which follows concerns the policy considerations which separate the adherents of the objectivist position from those who espouse the subjectivist position. It should, however, be kept in mind that the two positions are not so different from each other as they seem. Colvin comments that:

> On the present theory of subjective recklessness . . . it makes little practical difference whether a subjective or an objective test is used for offences such as rape or criminal negligence in the operation of a motor vehicle. This is because of the common understanding that, under some conditions, there is a chance of injury as a result of driving and of non-consent as a circumstance of having sexual intercourse. This understanding is manifested in the deliberation and caution which is generally displayed by those who engage in these types of conduct. Since the actor's knowledge of social definitions can usually be inferred from their existence, the focus of inquiry will tend to be objective. Attention will be directed to the content of the common understanding respecting the circumstances of the particular case. The actor's own state of mind is more likely to be the central issue where the risks of conduct are less widely appreciated.[196]

The trend to devalue the traditional focus on the subjective state of mind of those accused of serious crimes may be deplored. Nevertheless, the trend exists and cannot be denied. It is very clear on any interpretation of the subjectivist position, as it is also clear on any interpretation of the objectivist position, that the accused in *Morgan* were guilty of the crime with which they were charged; *Morgan*, unlike *McEwan*,[197] was an easy case. Finally, when the rhetoric is swept aside, the similarity of the two positions in practice prompts agreement with Stuart, who said that: "righteous affirmation of the subjective approach to criminal responsibility is nugatory if we are to resort to exceptions which eat up the main principle. If we do want to impose

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Stone (1978), 40 C.C.C. (2d) 241, (Ont. C.A.) and *Fallon* (1981), 4 A. Crim. R. 411, (S.A.C.A.).

194. *Ibid.* See also Wilson, *supra*, note 189 at 194 and Wasik and Thompson, *supra*, note 166 at 328, 329.

195. Waski and Thompson, *id.*, at 342.

196. Colvin, *supra*, note 82 at 359-360, 373.

197. *Supra*, note 49, discussed at note 185, *supra*.

criminal responsibility for failing to measure up to an objective standard, let us do this quite openly, assuming we can make out a good philosophical case for it."[198]

V. *For Objectivism*

(a) *Lord Simon's View*

Lord Simon was the sole member of the House of Lords in *Morgan* who thought that, apart from authority, any belief by the accused that the victim was consenting must be reasonable if it is to excuse. Lord Simon's reasoning is too extensive to quote, but the following is a summary of his views:

> (1) Mens rea crimes may be classified as those involving basic intent or those involving ulterior intent. The classification of the mental element involved in any given case turns on whether the mental element is attached to a part of the actus reus, in which case it is basic, or whether the mental element is part of the crime independently of the acts, consequences, or circumstances prescribed in the offence as a matter of fact, in which case it is ulterior.[199]
>
> (2) The consent element in rape consists of a prescribed fact, the lack of consent, and a mental element attached to the fact, such as the knowledge of nonconsent. It is, therefore, a basic intent.[200]
>
> (3) When a matter of basic intent is at issue, proof beyond a reasonable doubt that the corresponding fact was present is sufficient prima facie proof that the basic intent was also present, so that the burden shifts to the accused to negate the inference of intent. On the other hand, proof of the actus reus carries no implications for the existence of an ulterior intent because it is divorced from that actus reus.[201]
>
> (4) Rape is a crime of basic intent. Hence, proof that the woman did not in fact consent, being prima facie proof that the accused knew that she did not consent, is sufficient to compel him to rebut the inference. Hence, the evidentiary burden is upon the accused to deny mens rea. The only way in which this can be done is by showing that the mistaken belief was reasonable.[202]

This theory has attracted a number of critics and, as far as one can tell from the line-up of academic commentators, no supporters. It is submitted that, for a number of reasons, it is unsound and ought to

198. Stuart, *supra*, note 25 at 188. See also Gordon, *supra*, note 85 at 387.
199. [1975] 2 All E.R. 347 at 363-364.
200. *Id.*, 365.
201. *Id.*, at 364-365.
202. *Id.*, 365, 366-367.

be buried. First, it is incorrect to rely upon what Fletcher calls the "willingness of common-law judges to conflate the burden of going forward with the risk of non-persuasion."[203] As Smith has recently remarked:

> It is not possible or sensible to conclude from a procedural quirk anything about the scope of the substantive law. The explanation may well be that appearances are deceiving, and that the inference as to intent cannot be drawn from what was seen, but for reasons not apparent to the witness. If the defendant's explanation is that he made a mistake, we cannot conclude that it must be a reasonable, non-negligent mistake merely because it lies with the defendant to assert that a mistake was made.[204]

That is especially so in the classic case where knowledge cannot be inferred immediately because there is no evidence that the victim resisted the advances of the accused, but submitted unwillingly by reason of fear. Second, there is a fallacy in Lord Simon's reasoning, as is revealed by Cowley in his statement that:

> There is no connection between the incidence of the evidential burden and the question whether the mistake must be reasonable, the main reason being that an evidential burden on the defendant merely requires him to give some *reasonable evidence of belief* as opposed to *evidence of reasonable belief*.[205]

It has been suggested that the roots of the fallacy lie in the law as it was before the accused could give evidence.[206] Without the benefit of evidence from the accused, the jury needed a test of reasonableness in order to evaluate whether the mistake had in fact been made. That is obviously not the case today.

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203. Fletcher, *supra*, note 19 at 530.

204. Smith, *Rethinking the Defence of Mistake* (1982), 2 Ox. J.L.S. 429 at 435. Fletcher, *id.*, at 707-708, and Cross, *supra*, note 17 at 546, criticize Lord Simon's view on a similar ground. Moreover, at [1975] 2 All E.R. 347 at 364, Lord Simon admits that the shifting of the burden is not really invariable; it happens "generally".

205. Cowley, *supra*, note 183 at 207, citing Glanville Williams, *The Mental Element in Crime* (1975), 125 New L. J. 968 at 969 and comment by Smith, [1975] Crim. L.R. 40 at 43-44. See also Sellers, *supra*, note 18 at 248 n.17, in which it is said that "his argument, doubtful in several aspects, seems to rest on the fundamental misconception that some (i.e. reasonable) evidence of a mistake (necessary to discharge the evidential burden) is the same thing as some evidence of a reasonable mistake. *Perhaps the moral is to beware of the term 'reasonable'* (emphasis added)."

206. See, for example, Glanville Williams, *supra*, note 15 at 99; Cross, *supra*, note 17 at 546; O'Connor, *Mistake And Ignorance In Criminal Cases* (1976), 39 M.L.R. 644 at 654.

Another aspect of Lord Simon's view is more controversial. His logical construction rests, in part, on a question-begging assertion of injustice and, in part, on the assertion that "the rationale of requiring reasonable grounds for the mistaken belief must lie in the law's consideration that a bald assertion of belief for which the accused can indicate no reasonable ground is evidence of insufficient substance to raise any issue requiring the jury's consideration.[207] The rationale consists of two parts. The first part holds that a bald assertion of the accused's belief in consent is not sufficient evidence of that belief to put it to the jury. The second part holds that, *because* that is so, the accused must produce reasonable grounds for that belief before the matter can go to the jury. Hence, the requirement is one of reasonable mistake, not merely of mistake. As Cowley has pointed out, there is a theoretical difference between requiring proof of a reasonable belief, and reasonable proof of belief.[208] If that is accepted, as it surely must be, the word "because" has no logical force and the proposition collapses. But Cowley's distinction requires that it is possible, as a matter of practice, for an accused to produce evidence of belief which is external to his own assertion, and which is at once reasonable evidence of his own belief and yet not evidence of the reasonableness of his alleged belief. The theoretical gnat has produced a practical camel. That camel is called *Pappajohn*.[209]

(b) *The Decision in Pappajohn*

In Pappajohn, the complainant was a real estate seller and the accused was a businessman seeking to sell his house. They met by arrangement for lunch, which began at 1:00 p.m. and lasted until 4 or 4:30 p.m. and involved the consumption by both parties of a great deal of alcohol. During the lunch, the two visited a friend of the complainant who later testified that "it look to me like she hand [sic] it to him on a platter." After the lunch, they left to go to the house of the accused. Each later gave a very different version of what happened in the house. The complainant claimed that a number of acts of rape took place against her will and in spite of her protests and struggles. The accused held that a sexual encounter, involving no more than some coy objection on the part of the

207. [1975] 2 All E.R. 347 at 367, quoting Bridge J. from the decision of the Court of Appeal in *Morgan*, [1975] 1 All E.R. 8 at 14.
208. *Supra*, note 205.
209. *Supra*, note 45.

complainant, had occurred. He stated that the encounter ended when he attempted sexual bondage and she objected. It was agreed that, at 7:30 p.m., the complainant ran from the house in a state of distress with a man's bow tie around her neck and her hands tied behind her back. The trial judge decided that the relevant issue was whether or not there was, in fact, consent, and he refused to put to the jury any issue of mistaken belief in consent. In the end, the jury convicted, and a majority of the British Columbia Court of Appeal agreed with this ruling, although Lambert J.A., dissenting, held that there was sufficient evidence of honest and *reasonable* mistaken belief to go to the jury.[210] A majority of the Supreme Court of Canada also agreed with the ruling of the trial judge and six of the seven Supreme Court judges took the opportunity to state that *Morgan* was correctly decided. Thus, in Canada there is no requirement that the accused's mistaken belief in consent be a reasonable belief.[211] Nevertheless, the majority may well have diluted the force of that holding in its decision on the facts.[212] Their decision resembles nothing so much as the "rationale", provided by Bridge J. and adopted by Lord Simon, for reaching the opposite conclusion on the law.[213]

McIntyre J., for the majority, began by adopting the test, formulated by Fauteux J. in *Kelsey,* for controlling what facts are put to the jury. This test requires that there be "some evidence or matter apt to convey a sense of reality in the argument, and in the grievance."[214] His Lordship correctly stated his task as that of finding, in the evidence, something which would give a sense of reality to the contention that the accused may have believed that the complainant was consenting, even though she did not consent. He was unable to do so for two reasons, one of law and one of fact.

The factual reason, described in the following, is based on the inconsistency of the two stories:

> The two stories are . . . diametrically opposed on this vital issue. It is not for the trial judge to weigh them and prefer one to the

210. [1979] 1 W.W.R. 562, 45 C.C.C. (2d) 67, 5 C.R. (3d) 193, (B.C.C.A.).
211. 52 C.C.C. (2d) 481 at 495-500 (Dickson J.), at 515 (McIntyre J.). Martland J. dissented (at 485) because, in his view, the issue did not arise on this particular appeal.
212. *Id.*, at 515, holding that the "defence" of mistaken belief was properly withdrawn from the jury on the facts at bar.
213. See, *supra,* note 207.
214. *Kelsey,* [1953] 1 S.C.R. 220, 105 C.C.C. 97 at 102, 16 C.R. 119, cited, *id.*, at 510.

> other. It is for him in this situation, however, to recognize the issue which arises on the evidence for the purpose of deciding what defences are open. In this situation the only realistic issue which can arise is the simple issue of consent or no consent. In my opinion, the trial judge was correct in concluding that there simply was not sufficient evidence to justify the putting of the defence of mistake of fact to the jury. He left the issue of consent and that was the only one arising on the evidence.[215]

It should be noted that this part of the opinion cannot and should not be taken as authority for the proposition that the accused can never assert, alternatively, that the complainant consented or that he believed that she consented. It may well be that such cases are rare, but there is nothing illogical in that position.[216] McIntyre J. is only saying that such a position is not open on the facts of this individual case, and his basis for this claim is the total inconsistency of the two stories.

An assessment of the evidence reveals that, if one believes the account of the complainant, the accused cannot have believed that she consented. The account of the accused, however, can be taken primarily as an assertion that she consented, but that if she did not consent, all the circumstances led him to believe that she did consent. The reason for this is simple. When an accused says "She consented", he can only be saying that he believed that she consented. It is, therefore, either difficult or impossible to examine evidence and say that, in one case, it is evidence that she consented, whereas in another it is evidence that he believed she was consenting even though she did not.[217] It follows that one can believe the account given by the accused and yet believe that the complainant did not consent. Moreover, there is no reason why the jury should be compelled to take one story or the other as a complete and accurate account. The jury may well decide that both are coloured or embroidered versions of the incident which lay, in reality, somewhere between the two perceptions.

The second reason given by McIntyre J. for his failure to find evidence that the accused believed that the complainant was consenting is a legal reason. It deals with the impossibility of

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215. *Id.*, at 514.

216. See, for example, Note, *supra,* note 86 at 435.

217. Hence, in examination of the evidence in the context of mistaken belief, Dickson J. listed nine matters in evidence lending some credibility to the story of the accused (52 C.C.C. (2d) 481 at 505). However, these matters go principally to the argument, not at issue on appeal, that V consented in fact.

separating evidence which would lead the accused to say "she consented" from evidence which would lead the accused to say "I thought she consented". McIntyre J. joined with Bridge J. in stating that the latter type of evidence is of minimal value:

> It would seem to me that if it is considered necessary in this case to charge the jury on the defence of mistake of fact, it would be necessary to do so in all cases where the complainant denies consent and the accused asserts it. To require the putting of the alternative defence of mistaken belief in consent, there must be, in my opinion, some evidence beyond the mere assertion of belief in consent by counsel for the appellant. This evidence must appear from or be supported by sources other than the appellant in order to give it any air of reality.[218]

It is submitted that Bridge J., Lord Simon, and McIntyre J. are quite wrong in this. One measure of their error is that the first and second of these judges offer the view in order to support their objectivist position, while the last does so despite his support of the subjectivist position. The unsoundness of this view is not, however, restricted to that matter. McIntyre J. quite clearly believes that he is considering a defence.[219] That view is, as it were, unreasonable. Once it is conceded that the consent element in rape requires mens rea, then whether one subscribes to *Morgan* or not, that mens rea, whatever it is, must be proven beyond a reasonable doubt by the Crown. The jury must be directed in such terms and, hence, the issue of the proof of mens rea is always before the jury. It is not a matter of defence to urge that the Crown has not proved its case.[220] Moreover, even a bald assertion by the accused is some evidence of its content. Its weight and credence is a matter for the jury.[221]

There is some authority for the proposition that the view is wrong even in cases where one is considering an affirmative defence of reasonable belief. The Tasmanian Supreme Court decided in 1972 that the correct construction of the Tasmanian Criminal Code was that mens rea as to consent is not required, but that the accused may escape conviction if he shows the affirmative defence of reasonable

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218. *Id.*, at 514, applied in *Deol* (1981), 23 C.R. (3d) 324, (Alta. C.A.).
219. *Id.*, at 509: paragraph 3 uses the word "defence" no less than eight times; see also *id.*, at 510, 515.
220. See, for example, Note, *supra*, note 86 at 434-435; Dickson J. *id.*, at 494, where it is stated that: "[m]istake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence."
221. See, for example, Cross, *supra*, note 17 at 546; Note, *supra*, note 100 at 206; Note, *supra*, note 175 at 688.

mistake.[222] As with the opposite conclusion in *Morgan*, this decision provoked some disquiet.[223] Not the least of this dissent occurred in the Tasmanian Supreme Court itself, where in 1972, Chambers and Neasey J.J. commented that the original decision might require reconsideration in an appropriate case in the future.[224] Their comment was part of their decision in *Ingram*, which concerned the question of whether the trial judge had properly failed to put the affirmative defence to the jury. Chambers J. held that "in my judgment when an accused says in evidence 'she consented' he is saying no more than 'my belief is that she was consenting'. A formal 'offer and acceptance' is unlikely in most cases of alleged rape and juries must determine questions of consent and mistake by a consideration of the conduct of the parties, which may be unmistakeable in its significance."[225] On the specific matter of the accused who baldly asserts that he believed that the complainant was consenting, the court adopted the directions set out in the judgment of the New South Wales Court of Appeal in *Sperotto*.[226] Those directions state that a bald assertion should go to the jury, along with the direction that there is no material capable of supporting that belief.[227] But it is clear that supporting matters may come from the account of the accused alone, unsupported by evidence from third parties.[228]

The weakness of the proposition may be judged by its various contexts. Bridge J. and Lord Simon are of the opinion that it supports the claim that the test of culpability ought to be objective. McIntyre J. supports the subjective view, and the Tasmanian Court of Appeal, while espousing the objective view, adopts a contrary position, perhaps because it wants to give defendants every opportunity to use the limited objective test which it feels to be too harsh.[229] Also problematic is why a different test should be imposed for the consideration of the jury if the accused says that the woman

222. See, *supra*, note 47.
223. Contrast the approval of Cox, *Law Reform And Rape Under The Tasmanian Criminal Code*, in Scutt, *supra*, note 1 at 49, with the disapproval of Blackwood, *The Mental Element in Rape in the Criminal Code* (1982), 56 A.L.J. 474.
224. *Ingram*, *supra*, note 29 at 258, 262.
225. *Id.*, at 267.
226. *Supra*, note 48.
227. [1970] 1 N.S.W.R. 502 at 505-506 (propositions 8 and 10), citing *Gammage* (1969), 44 A.L.J.R. 36 at 39, (H.C.).
228. *Ingram*, *supra*, note 29 at 259.
229. Blackwood, *supra*, note 22 at 478.

consented than would be imposed if the accused said that he thought that the woman consented. Surely it is nothing less than bizarre for McIntyre J. to hold that the story of the accused in *Morgan* had an air of reality, but that the story of the accused in *Pappajohn* did not.[230]

The most charitable explanation for this silly rule is guilt about the legal tests for culpability, combined with the view that the jury in a rape case will usually favour the defendant. That is, the Tasmanian Supreme Court feels guilty about the severity of the objective test, and so gives the defendant every opportunity to use it. The Canadian Supreme Court feels guilty about the scope and power of the subjective test, and so restricts the ability of the accused to use it. The common factor is the belief that the jury, given half a chance, will acquit the accused. That belief is common to those who espouse the objective test, for its greatest effect is the transference of power from jury to judge.[231]

(c) *The Role of the Jury*

The theme that the jury will acquit the accused in a rape trial, given even half a chance, is redolent in the literature, particularly among those who would impose an objective standard of culpability on the accused. Indeed, that is hardly surprising, given that a primary function of objective tests and their more obvious evidentiary equivalent is the transfer of decision-making power from the jury to the judge. Some conclusions that the jury is biased against the complainant are based on anecdotal evidence,[232] and some are based on statistical study.[233] Despite fears of what might result if decision-making power were consolidated in judicial hands in other rape contexts,[234] there can be no doubt that judges impose artificial and objective tests of liability in rape precisely because they, too,

230. 52 C.C.C. (2d) 481 at 515.
231. *Supra*, note 86.
232. See, for example, Geis, *Forcible Rape: An Introduction* and Le Grand, *Rape and Rape Laws: Sexism In Society And Law* in Chappell, Geis and Geis, *supra*, note 1 at, respectively, 38 and 75; Coonan, *Rape Law Reform — Proposals For Reforming The Substantive Law* in Scutt, *supra*, note 1 at 40-41.
233. Geis, *id.*, at 37-38, citing Kalven and Zeisel, *The American Jury* (Little Brown, 1966). The most recent detailed research is that by Feild and Bienen, *Jurors And Rape* (Lexington Books, 1980).
234. See, for example, Scutt, "Evidence And The Role of The Jury In Trials For Rape", in Scutt, ed., *supra*, note 1 at 100-101.

fear that the jury may unjustifiably acquit the accused rapist.[235] Thus, in *Pappajohn*, McIntyre J. presents the spectre of every jury in a rape trial being charged on the subjective mental element of rape as if this was a thing to be despised and avoided.[236] Why should it be so, however, unless one cannot trust a jury to discern the difference between an honest belief and one trumped-up to suit the expediency of the moment? Dickson J. was right to quote Dixon J., of the Australian High Court, as saying in this context that ". . . a lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and humane criminal code."[237]

Despite periodic reaffirmations of faith in the institution of the jury to carry out the tasks entrusted to it,[238] many have serious reservations with regard to the ability of the jury system, as it is presently administered, to reach fair and just decisions in rape cases.[239] Scutt concludes that:

> Certainly if the jury is to be retained as a part of the criminal justice system, then those who must become aware, as a top priority, of the difficulties attaching to rape trials and the prosecution of rape as an offence, are persons serving as jurors. Part of the responsibility lies on counsel in rape trials to alert members of the jury to their own prejudices. However the ultimate responsibility lies upon a system seeking to retain the jury, to meet with problems encountered in keeping "community justice" in the courtroom. Where judges are required to adopt a balanced approach to rape trials by following procedures presently adhered to in other criminal trials and in addressing prejudicial issues that may in the past have swayed their own judgment, juries will be provided with a proper opportunity for viewing the crime of rape, and the rape trial in proper context. When the jury is to be the final arbiter, it must be given all information appropriate to that decision: a recounting of the

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235. See, for example, Cross, *supra*, note 17 at 546; Glanville Williams, *supra*, note 161 at 254-255. Gordon, *supra*, note 85 at 370-371, exemplifies the fear. At 371, he states that "one of the problems of an excessively 'subjective' approach is that it is likely to feed what I often fear is an unfounded conceit in our ability to gauge a witness' truthfulness by his demeanour."

236. *Pappajohn*, 52 C.C.C. (2d) 481 at 514.

237. *Id.*, at 500, quoting *Thomas*, *supra*, note 51 at 309.

238. See, for example, Heilbron, *supra*, note 13 at para. 71; Law Reform Commission of Canada, Report No. 16 (1982) at 5.

239. See, for example, the material cited in notes 232, 233, *supra*.

> nature of rape in its social setting would seem to be such information.[240]

Juries represent, in a crude way, the attitudes of the community from which they are drawn. If those attitudes mean that it will be very difficult to obtain deserved rape convictions, then changing those attitudes and the perceived self-interest of the average juror[241] are a far better way of solving the problem than creating artificial laws of evidence and substance so that the jury may be more effectively controlled or deprived of the power to perform its function.

It has been suggested that one way of "educating" the jury is to ensure that women have a more adequate representation on rape juries.[242] These proposals have been accepted or rejected on the assumption that the reform would make a difference to jury decisions. For example, such a proposal was put to the Criminal Law and Penal Methods Reform Committee of South Australia, and was rejected because a study of the statistics in South Australia revealed that there was no reason to conclude that women were more likely to convict alleged rapists than were men.[243] It is

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240. Scutt, *supra*, note 234 at 109.

241. See, for example, Clark and Lewis, *supra*, note 134 at 143-144.

242. See, for example, Heilbron, *supra*, note 13 at paras. 179-189; Report of the Law Reform Commission (Tasmania, No. 3 of 1976), at 8-9; Mitchell Committee, *supra*, note 27 at 53. It is commonly alleged that more women than men request and are granted exemption from jury service, and that jury challenges are used to eliminate women from rape juries.

243. Mitchell Committee, *id.*, at 54, reports the following figures covering 1965-1975 in South Australia:

Majority female juries:	
Total of prisoners	28
Verdicts:	
Not guilty	14
Guilty	14
Majority male juries:	
Total of prisoners	36
Verdicts:	
Not guilty	17
Guilty	19
Juries of equal numbers:	
Total of prisoners	23
Verdicts:	
Not guilty	12
Guilty	11

submitted that such a study should be done in Canada before similar reform is suggested. In conclusion to the last three sections of this article, it is submitted that Lord Simon was correctly left in dissent, and that the majority decision in *Pappajohn* on the evidentiary bar to denial of mens rea is equally wrong and should be discarded.

(d) *Professor Fletcher's Analysis*

Professor Fletcher uses *Morgan* to illustrate his own view of the proper analysis of the elements of fault appropriate to particular offences. In *Rethinking Criminal Law*,[244] Fletcher proposes a distinction between matters of definition and matters of justification. This distinction is set out in a series of premises:

1. The definition of an offence is the violation of a prohibitory norm.
2. The prohibitory norm identifies the minimal set of objective circumstances necessary, in the given cultural context, to state a coherent moral or social imperative.
3. There is no violation of a prohibitory norm unless the actor acts intentionally or knowingly with respect to the elements of the definition (the prohibitory norm) . . . .
4. Relevant mistakes about elements extrinsic to the definition are excuses.
5. Elements of justification are extrinsic to the definition.
6. Excuses are not valid unless they negate the actor's culpability
7. A mistake does not negate culpability unless the making of the mistake was blameless.[245]

According to this scheme of things, mistakes regarding elements of the definition need only be honestly made, whereas mistakes

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Total number of matters in which there were verdicts:	87
Total not guilty	43
Total guilty	44

244. *Supra*, note 19.

245. *Id.*, at 696-697. See also Smith, *supra*, note 204 at 433, where it is stated that:

> [I]f the mistake is made about a definitional element, it need not be reasonable since it regards the violation of a prohibitory norm, whereas if it relates to a matter of justification or excuse, it must be reasonable. An unreasonable mistake is by definition culpable, and since attribution and culpability are reciprocal, culpability can be attributed to a person who makes an unreasonable mistake.

regarding elements of justification must be reasonably made. Hence, the question is whether the consent element of rape is a matter of definition or justification. It should be obvious that this question cannot be resolved simply by resorting to the legal definitions.[246] Fletcher's view that the consent of rape is a matter of justification is expressed as follows:

> Intimate touching of the genitals is hardly routine; the touching requires a good reason. The reason, or the justification, might be the consent of the person touched or it might be the necessity of performing an operation in an emergency situation. This seems to me to be sufficient to regard the definition of rape as sexual penetration, with consent functioning as a ground for regarding the sexual act as a shared expression of love rather than as an invasion of bodily integrity.[247]

It follows that the mistaken belief of the accused as to consent must be reasonable in order to excuse. Fletcher expresses two doubts that he has about this result. First, he points out that clear matters of justification, such as self defence, are an exception to a prohibitory norm, whereas consent is the normal case, rather than an exception. Second, matters of justification usually represent reasons for the inflication of harm, whereas consent shows that there was no harm inflicted at all.[248]

There are problems with the conceptual structure thus erected and applied by Fletcher. These have been reviewed by Smith, and are summarized in three criticisms, as follows. First, the analytical apparatus does not reflect the questions which are at issue, such as who we are trying to punish and why, in a way that is better than any other, and, hence, it may dictate results that are at odds with a given view on a question without reference to policies bearing on that question.[249] Second, Fletcher himself admits that the crucial distinction which he draws between definition and justification is "suggestive, but at the same time problematic."[250] Third, in admitting that the key distinction is imprecise,[251] Fletcher also admits that it does lead to many cases, such as *Morgan,* in which the

246. Fletcher, *id.*, at 702-703, criticizing the speech of Lord Hailsham in *Morgan*. To do otherwise would be to sacrifice moral principle to the fortuity of a legislative whim.
247. *Ibid.*
248. *Id.*, at 707.
249. Smith, *supra,* note 204 at 433, 435.
250. *Id.*, at 434.
251. *Id.*, at 435.

result is dictated from midair and is qualified by doubts which can be resolved only by an unsubstantiated preference for one set of doubts over another.[252] In addition, the doubts expressed by Fletcher, which concern the result of applying the distinction to the consent element in rape, are surely quite substantial.[253] These difficulties with the theory become all too apparent when one assesses the reasons why consent is held to be a matter of justification, rather than a matter of definition. The reason seems to be that sexual contact requires a good reason and that a good reason is usually the consent of the other party. The problem with this is that the inquiry is not into whether consent is definitional or justificatory to sexual contact (it is obviously justificatory), but whether consent is definitional or justificatory to *rape*. The difference between the two concepts is that one is defined by the lack of consent and the other is not, both as a matter of the social concept as well as by the law. The fact that Fletcher has concentrated on the wrong behaviour is demonstrated by the consequences of the classification described as follows.

The search for definitional elements is the search for "the minimal set of criteria that, in the given society, conveys a morally significant prohibition" that is "necessary to incriminate the actor."[254] Thus, Fletcher has concluded that sexual intercourse is, per se, an incriminating behaviour. This is a nonsense which surfaced in an earlier part of this discussion and was rejected at that stage.[255] But Fletcher does not resile from this position. He argues that, because there is biblical evidence that it was better for a woman to be raped than to consent to the sin of fornication, rape and fornication are separate sins.[256] However, it is submitted that this odd and oddly selective view of biblical sin hardly elicits the incredulity with which one might treat the proposition that sexual behaviour is, in general, worthy of moral condemnation. Fletcher also argues that, even if consensual sexual acts are socially acceptable, it does not follow that nonconsent is definitional because arrest on the basis of probable cause is socially acceptable and, yet, is a matter of justification.[257] But this is not to the point.

252. *Id.*, at 436.
253. Fletcher, *supra*, note 19 at 707.
254. Smith, *supra*, note 204 at 435.
255. *Supra*, notes 139, 151.
256. Fletcher, *supra*, note 19 at 707.
257. *Ibid.*

The question is not whether consensual sexual acts are socially accepted, but whether sexual behaviour is, in general and without further specification, subject to moral condemnation that is sufficient to incriminate the actor. Moreover, an arrest example provided is without content, for there has been no exact situation provided. The matter of probable cause may or may not be definitional if one considers that the policy officer in question has been charged with an offence of (say) violation of a civil right. It is submitted that Fletcher's analysis provides no reason for the conclusion that the decision in *Morgan* was wrong.

(e) *The Danger of Bogus Defence*

Some of the adverse reactions to the decision in *Morgan* were grounded on the view that, as a result of that decision, all an accused had to do to escape conviction for rape was to spin some tale of belief in consent.[258] There are a number of responses to this fear. First, the argument brings us back to the old point that mistrust of the good sense of juries is not a defensible basis for the alteration or construction of substantial doctrine.[259] There is nothing demonstrably special about the crime of rape that warrants departure from this sensible observation.[260] If the credulous jury is the problem, then it is best to attack the matter directly, particularly when the shotgun approach does not distinguish between the meretricious and the meritorious.[261] Second, an experienced policy surgeon in the Australian State of Victoria who, for some unspecificed reason, espouses the objective position, admits that Victoria has managed the subjective position for thirty-five years without a single cause celebre to give any critic pause.[262] Third, it should be clear by now that there is very little difference in practice

258. See, for example, such fears reported by Glanville Williams, *supra,* note 15 at 101; Heilbron, *supra,* note 13 at para. 69; Note, *supra,* note 100 at 206; Williams, *Criminal Law* in Baxt, ed., *Annual Survey* (Law Book Co., 1981) at 1-2.
259. See, *supra,* notes 232-237.
260. See, for example, similar comment by Fletcher, *supra,* note 19 at 699; Glanville Williams, *supra,* note 15 at 101; Heilbron, *supra,* note 13 at paras. 69-73; Smith, *The Heilbron Report* [1976] Crim. L.R. 97 at 99; *Pappajohn,* 52 C.C.C. (2d) 481 at 500: "it will be a rare day when a jury is satisfied as to the existence of an unreasonable belief."
261. Glanville Williams, *supra,* note 161 at 338, col. 1, asked, "[d]o the judges believe that the importance of convicting unmeritorious people outweighs the importance of acquitting meritorious ones?"
262. Bush, *Rape in Australia* (Sun Books, 1977) at 95-96.

between the objective and the subjective positions. The subjective orthodoxy is bent very nicely in hard cases, as has been seen above, by the manipulation of the rules that govern what evidence may go to the jury, by fudging of the definition of such subjectivist terms as "recklessness" and "wilful blindness", by direction to the jury regarding the credibility of bald assertions of belief in consent, by the fact that the evidential burden of persuasion is on the accused, and by other procedures. Pickard expresses astonishment that the Supreme Court of Canada and the House of Lords should have chosen cases in which the resolution of the problem did not bear directly upon the result of the case to expound their preferred solution to "this conceptually intractable and politically sensitive issue."[263] The answer is surely obvious. Juries must be directed, no matter how much Pickard would like the issue to remain open. There must be a reason why the law of rape has only recently thrown this problem into such stark relief in such indirect cases. Perhaps the direct cases are so rare and are so easily solved by the jury that they do not go beyond conviction. Perhaps the system is working. Or perhaps the appellate courts were tired of waiting for the nonexistent, and, like the *Pappajohn* court, finally seized a good opportunity to deal with academic disputation which could only unduly complicate the proper jury instruction.[264] Fourth, it must be realized that our hypothetical accused treads an impossible tightrope which may explain the rarity of the direct case. The Heilbron Committee remarks of the "defence" of mistaken belief in consent that:

> In many cases this "defence" would be a "desperate defence" to advance. This is particularly so when the signs of lack of consent are obvious, as when it is established that the man has used violence or threats of violence, or has been armed with a weapon. Furthermore, it will usually be extremely difficult for the accused to contend that he genuinely believed that the victim consented, without also contending that she did in fact consent, and saying so, for example, in any statement he makes to the police. Once

263. Pickard, *Culpable Mistakes and Rape: Harsh Words on Pappajohn* (1980), 30 U.T.L.J. 415 at 415, n.3.

264. *Pappajohn*, 52 C.C.C. (2d) 481 at 499 (Dickson J., dissenting): "The ongoing debate in the Courts and learned journals as to whether mistake must be reasonable is conceptually important in the orderly development of the criminal law, but in my view, practically unimportant because the accused's statement that he was mistaken is not likely to be believed unless the mistake is, to the jury, reasonable."

> the jury has reached the conclusion that she did not consent, the accused will normally appear a liar, and his claim that he nevertheless believed in consent is likely to be rejected. We appreciate that in very exceptional circumstances the accused may succeed in treading what amounts to a tightrope; what we doubt is whether such cases will occur at all frequently.[265]

The two matters raised in this explanation of the "tightrope" defence are worthy of additional comment. First, the general practical incompatibility between the more usual plea of "she consented" and the plea "I thought that she was consenting" is recognizable here without succumbing to the temptation displayed by McIntyre J. to turn it into a legal rule and, thereby, defeat the jury process that is bound to catch the accused. Second, it is interesting to note that in the absence of the most compelling evidence, the accused who uses force, threats, or a weapon cannot succeed with a plea of mistaken belief unless the mistake is more than reasonable. Given the research which indicates that a very high proportion of rapes are accompanied by force, threats, or a weapon, this fact may explain the rarity of the mistaken belief case which amounts to more than a plea of desperation and is treated as such.[266]

The most obvious answer to the bogus defence argument is that the rule in law that the belief of the accused need not be shown to be reasonable in order to excuse him or her does not mean that the reasonableness of the belief is irrelevant to the case. On the contrary, the reasonableness of the belief is very cogent evidence that is to be put to the jury so that it may determine whether or not the belief was actually held. The more unreasonable the belief, then, in the absence of special circumstances, the more unlikely it is that the jury will credit the story of the accused.[267] Dahlitz has attempted to argue the converse, namely, that if reasonableness is a requirement, then an honest belief would be cogent evidence that the belief was reasonable.[268] That, however, is surely nonsense, is not to the point of the legal tests involved, and misses the point that

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265. Heilbron, *supra*, note 13 at para. 69. See also Glanville Williams, *supra*, note 15 at 103 and Cross, *supra*, note 17 at 552.

266. See, for example, Brownmiller, *supra*, note 3 at 184; Clark and Lewis, *supra*, note 135 at 66; Le Grand, *supra*, note 1 at 68; Mitchell, *supra*, note 27 at 6.

267. This point is made by most commentators. Examples are: Glanville Williams, *supra*, note 15 at 99; Toner, *supra*, note 4 at 137; Howard, *supra*, note 19 at 372; Gordon, *supra*, note 85 at 368; Note, *supra*, note 100 at 206; Stuart, *Criminal Law and Procedure* (1977), 9 Ottawa L.R. 568 at 580; Wells, *supra*, note 152 at 212; Cowley, *supra*, note 183 at 207.

268. Dahlitz, *supra*, note 4 at 17.

one test is more exacting than the other. Again, the issue comes back to the necessary faith in the decision-making powers of the jury as constrained by the twists and turns of the flexible legal doctrines explained to them by the judge.

The hard case is not the bogus defence at all. The hard case is the most genuine of defences. It is put most eloquently by Bienen, who says "take, for example, a defendant who says, "I always beat up my partners. They *always* protest a *little*. Most women are masochists. Of course I had never met this one before, but *they all* really love it in spite of the broken noses and bruises. For me sex and violence go together. And this one didn't love it. That's my mistake."[269] Leaving aside the admission by Bienen that juries reject this sort of evidence because of its inherent implausibility, let this view be considered on its so-called merits. Let it be supposed that this is an honest belief. What, then, is to be done? Clearly, the answer is surely that the belief is hardly to the point. The fact that one entertains a belief about women generally and in all circumstances is not conclusive as to one's belief about the woman in question.[270] The sadist's belief is a general belief, and is completely equivocal concerning the crucial question, "what was his belief concerning *this* victim, at *this* time?" If it is an insane belief, then regardless of what defensible insanity rules apply, the question of pure mistake is precluded. More importantly, it is impossible to believe that a properly directed jury could not find such an accused reckless.[271] The answer to the argument based on the bogus defence, or, indeed, on the honest defence of the sadist, is that it overlooks the function and operation of the tribunal of fact in rape cases. Moreover, it overlooks the variety of legal techniques developed in order to deny just such a bad excuse. Foremost among these is the burgeoning concept of recklessness. Thus, it is submitted that there is, in the objectivist arguments discussed

269. Bienen, *Mistakes* (1978), 7 Philosophy & Public Affairs 224 at 239, citing a silly comment to the same effect from Comment, *Forcible And Statutory Rape: An Exploration of The Operation and Objectives of The Consent Standard* (1952), 62 Yale L.J. at 66-68.

270. However, a belief in the behaviour of a specific woman in closely confined repetitious circumstances very well may be conclusive: see *Mayer* v. *Marchant*, *supra*, note 58, quoted, *supra*, note 73.

271. See, for example, Colvin, *supra*, note 82 at 359, where it is said that: "The accused cannot simply rely on his own peculiar notions of the sexuality of women. There must be *credible* evidence of failure to appreciate the ordinary understandings of protest and resistance. The tactical burden will be very difficult to overcome without an assertion of deficient mental capacity (emphasis added)."

above, no sound basis for the position that the decision in *Morgan* was incorrect in law, logic, or policy.

Two other matters require brief mention. First, Bienen argues against the principle of subjective culpability on the ground that it provides the defence with an additional bargaining tool in the plea bargaining process.[272] That may well be so, but the argument is more relevant to the issue of plea bargaining than it is to the mental element of rape. If all issues were to be decided on that basis, then the proof of all crimes would be complete on proof of actus reus. Bienen, among others, has also pointed out that concentration on the mental element of the accused may well subvert the intention of statutes that have recently been enacted and which limit the introduction of "chastity" and "reputation" evidence.[273] That may be regrettable, but is hardly a reason for the limitation of mens rea.[274] Such evidentiary legislation is usually parasitic on legal relevance, and not the other way around. If the belief of the accused is relevant, then he should be allowed to show the reasons for that belief in accordance with the normal rules of evidence regarding relevance and prejudice. Moreover, even if what was required was reasonable belief, the evidence would be equally relevant. It is now, however, sufficient to simply demolish any argument that favours the objectivist position. It is also necessary to develop some reasons which may show that *Morgan* was right, and it is to the defence of what has been derided as "subjective orthodoxy"[275] of "the subjective bug"[276] that discussion now turns.

VI. *For Subjectivism*

The primitive English legal system did not openly distinguish between harm inflicted purposely and harm inflicted by accident.[277]

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272. Bienen, *supra*, note 269 at 233-234.

273. Bienen, *id.*, at 232-233. See also Dahlitz, *supra*, note 4 at 17; O'Grady and Powell, "Rape Victims in Court — The South Australian Experience", in Scutt, ed., *supra*, note 1 at 130, 131, 134.

274. Contra Mitchell, *supra*, note 27 at 30, where it is stated that "[i]t is likely to be very material to the issue of consent of the prosecutrix to sexual intercourse or the accused's belief in such consent that the parties have previously indulged in consensual sexual intercourse."

275. See, for example, Pickard, *supra*, note 263 at 420 n.20. An odd footnote.

276. Wells, *supra*, note 152 at 210 n.8, citing Cross, *supra*, note 17 at 551.

277. See, for example, Hogan, *Crime, Punishment and Responsibility* (1978), 24 Villanova L.R. 690 at 691-692: "A man was thought to be responsible simply because he had caused the harm. At a more primitive stage of legal development, beasts which had caused harm might be put to death and such irrational notion of

The evolution of the notion of fault has been traced by many, and was recently summarized by the Law Reform Commission of Canada.[278] The notion is interwoven with questions regarding moral culpability, political power, and the primacy of vengeance in any given society. The commission notes that, by the time of the classic English text writers, liability on the basis of personal fault was espoused and applied,[279] but the growth of the positivist movement in the late eighteenth and early nineteenth centuries produced, again, a concentration on the causation of harm at the expense of the moral fault of the actor. This movement, inter alia, resulted in the creation of offences of absolutely liability, and the reaction thereto produced the compromise of the defence of reasonable mistaken of fact.[280] That ideological conflict, in turn, produced defences of subjective culpability. The case has already been made, as follows:

> Vengeance imports a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done. It can hardly go very far beyond the case of a harm intentionally inflicted: even a dog distinguishes between being stumbled over and being kicked.[281]

> Even if one is skeptical of psychiatric theories of the enduring, pervasive effect of the conditions of infancy, one may doubt whether the failure to acquire normal skill is a moral fault with which criminal law may be properly concerned . . . Indeed, it may be doubted whether it is within any human competence to appraise this sort of assumed immorality — the accumulation of countless faults from childhood to the instant damage — in quantitative terms of specific penalties . . . Calloused character cannot be identified or equated with voluntary misconduct. Moreover, negligently caused damaged, unlike voluntary harmdoing, does not challenge the community's values as expressed in the penal law.[282]

'responsibility' must have contributed to the rules of deodand whereby any chattel, animate or inanimate, which caused harm was forfeit."

278. See The Law Reform Commission of Canada Working Paper No. 29, *Criminal Law: the general part — liability and defence* (1982), at 166-169.

279. See, for example, the early literature quoted by O'Connor, *supra*, note 206 at 644-645.

280. See, *supra*, notes 50-53.

281. Holmes, *The Common Law* (1881) at 6-7. See also Allen, *Criminal Law and the Modern Consciousness: Some Observations on Blameworthiness* (1977), 44 Tenn. L.R. 735 at 749, 761-762; Hogan, *supra*, note 277 at 702.

282. Hall, *supra*, note 155 at 636-637. See also Hall, *Ignorance and Mistake in Criminal Law* (1957), 33 Ind. L.J. 1 at 3, where it is said that: "To understanding the rationale of *ignorantia facti excusat*, it is necessary to recognize and take

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "but I didn't mean to".[283]
>
> The notion that a Court should not find a person guilty of an offence against the criminal law unless he has a blameworthy state of mind is common to all civilized penal systems. It is founded upon respect for the person and for the freedom of human will. A person is accountable for what he wills . . . to be criminal, the wrong doing must have been consciously committed.[284]

Glanville Williams, Jerome Hall, Herbert Packer, Colin Howard, and H.L.A. Hart,[285] among others, have made a cogent case for the position that punishment on the basis of subjective mens rea only shall be the fundamental principle of the criminal law, with as few jealously guarded exceptions as possible; their work cannot simply be dismissed as "subjectivist orthodoxy". The following is an attempt to highlight the strengths of the subjectivist position. First, it is difficult to justify punishment, of those who transgress under the influence of a mistaken view of the situation, by the use of the notions of deterrence, retribution, rehabilitation, and intimidation. Second, it may be argued that such punishment is not in accord with commonly held views of moral responsibility, and so offends against the standards of the general community which the law, at least in part, is supposed to represent. Third, punishment for the negligent commission of a major crime in the absence of legislative proscription may well offend against the constitutional division of powers in Canada.[286] Fourth, punishment for negligence is a blunt

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account of the relevant ethical principle, namely, moral obligation is determined not by the actual facts but by the actor's opinion regarding them."

283. *Morrissette* v. *U.S. (1952), 342 U.S. 246 at 251-252.*

284. Leary, 33 C.C.C. (2d) 473 at 486, (Dickson J.). See also Howard, *supra,* note 19 at 361-362 and Heilbron, *supra,* note 13 at paras. 74-76.

285. Hart, "Negligence, Mens Rea And Criminal Responsibility", in Guest, ed., *Oxford Essays in Jurisprudence* (O.U.P., 1961) at 29.

286. An Australian should be the last to buy into this dispute: I refer merely to *R.* v. *Prue & Baril,* [1979] 2 S.C.R. 547 at 548, 46 C.C.C. (2d) 257, 8 C.R. (3d) 68, 96, D.L.R. 577, [1979] 4 W.W.R. 554, where it is stated that: "There must be a substantive non-geographical basis for federal legislation, and where the criminal

weapon indeed for the education of a recalcitrant public and the furtherance of defensible social policy. Fifth, in the specific context of rape, punishment for negligence would mean the exclusive concentration of the law on the mental freedom of one party to a transaction, to the exclusion of the mental autonomy of the other.[287] Sixth, and perhaps most important, there is a distressing tendency to regard justice for the individual and justice for society as antithetical.[288] This is nonsense. The truth of the matter is that undeserved punishment for a major crime is unfair and unjust to all. It is *particularly* unjust to the person accused, for it deprives him or her of the chance to behave in accordance with the law.

The persuasive force of the "subjectivist orthodoxy" is shown in its endorsement by both the English Law Commission and the Law Reform Commission of Canada. The latter body has stated that:

> In previous papers we argued for the retention of responsibility. We did so on three grounds — liberty, justice and humanity. First, the doctrine of *mens rea* maximizes liberty: given a requirement of *mens rea*, the individual knows he is secure unless he breaks the law deliberately, and so can plan his life accordingly. Second, it maximizes justice: historically our law has always been to some extent concerned with doing justice, justice bases liability on fault, and *mens rea* articulates that basis. Third, the doctrine satisfies requirements of humanity: it makes the criminal law treat persons as persons, i.e. creatures to be reasoned with and called upon to answer for their actions.[289]

Two strands of these arguments for the strength of the subjectivist position bear some further emphasis. First, it is important to remember that the discussion concerns a very serious offence indeed, one which is punishable by life imprisonment and which has, in the past, attracted the death penalty. The imposition of liability for failure to comport with the standards of the reasonable person is almost invariably limited to offences which are not punishable by imprisonment at all, let alone imprisonment for life. Moreover, punishment on the basis of negligence is almost invariably confined to those offences which do

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law is considered, and especially where an offence is included in the *Criminal Code*, it is generally found in a requirement of proof of mens rea."

287. See Note, *supra*, note 2 at 456-457.

288. A most distressing example occurs in Wells, *supra*, note 152 at 211, in which the interests of justice and the interests of the accused are regarded as antithetical. Mitchell, *supra*, note 27 at 7-8, comments that the contest is not one between the accused and the "prosecutrix", but between the accused and the requirements of the law.

289. Law Reform Commission of Canada, *supra*, note 278 at 170-171.

not carry great moral and social opprobrium;[290] rape, in contrast to this, is an offence of great moral and social stigma. Both of these practices are designed to reduce to a minimum the number of persons who may be described as the luckless victims of the furtherance of the implicit legislative policy. Rape is an offence which is not even close to being a marginal case, despite the reality of sentencing practice.[291] Clark and Lewis submit that rape is not treated as a serious crime in Canadian society. Their claim is based on figures showing an average sentence for those convicted of rape of four to seven years in prison and an average practical serving time of eighteen to twenty-four months, roughly equivalent to the figures for robbery.[292] However, robbery is seen as a serious crime, and the average sentence for it is still a not inconsiderable term in prison. If the penalties for rape showed a rough equivalence to the penalties presently, and inadequately, meted out to those who manufacture dangerous goods or poison the environment, then their argument might be on safer ground.

If it is conceded, as it must be, that the sentencing practice for rape is not out of proportion to the severity of the crime, it does not necessarily follow that the negligent rapist does not deserve the attention of the criminal justice system at all. An offence of "negligent rape" has been mooted,[293] and those on both sides of the issue have rejected it. The Criminal Law and Penal Methods Reform Committee of South Australia rejected it on the ground that

290. See, for example, the extensive discussion by Hutchinson, *supra*, note 41. There is extensive authority for this proposition. See, for example, *Saulte Ste. Marie*, 40 C.C.C. (2d) 353 at 362-365, in which Dickson J. uses various terms, with "public welfare offence" predominating, in contrast to offences described as "true criminal offences". A major common law exception is involuntary manslaughter, but offences of homicide are always exceptional.

291. See, for example, Heilbron, *supra*, note 13 at para. 61; Mitchell, *supra*, note 27 at 6-7; Sellers, *supra*, note 18 at 247; Cross, *supra*, note 17 at 552: "[O]ne reason why the maximum punishment for rape is life imprisonment is that the common man considers rapists to be very wicked people. Someone who believes, albeit without reasonable cause, that the woman is consenting may well be stupid and insensitive, but he is not wicked in the sense in which the rapist is wicked." For social attitudes to rape, see Akman and Normandeau, *The Measurement of Crime and Delinquency in Canada* (1967), 7 Br. J. Criminal. 129; Kvalseth, *Seriousness of Offences* (1980), 18 Criminology 237.

292. Clark and Lewis, *supra*, note 134 at 56-57.

293. See, for example, Dahlitz, *supra*, note 4 at 38; Watson, "Reform of the Law of the Australian Capital Territory Relating To Rape And Other Sexual Offences", in Scutt, ed., *supra*, note 1 at 71; Cross, *supra*, note 17 at 552-553; Note, *supra*, note 86 at 437.

no penalty should be imposed in such a situation,[294] and at the other extreme, Temkin rejected it because it would derogate from the freedom of women to exist without fear of rape; it would condone the rapist and negate the right of females to have sexual autonomy.[295] The Heilbron Committee rejected such an offence, in part because they thought that it would unduly complicate the jury trial,[296] and Wells rejected it, in part because she could not see the rationality of a distinction between reckless and negligent rape if there is no distinction between reckless and intentional rape.[297] None of these reasons seem particularly persuasive in the absence of further specification and analysis. The more persuasive reasons focus on the predicted reaction of the jury. It can be argued cogently that the jury may well be tempted to use the new offence, in an overweening number of cases, as a catchall for those that are too hard. Thus, the Heilbron Committee felt that the compromise offence would be used for cases of doubt and/or sympathy, thereby rendering the just verdict even more difficult to come by.[298] Wells agreed, adding that the effect could be the perpetuation of double standards through the classification of the offence by the classification of the type of victim.[299] Here too, however, there is a distrust of the jury, and it must be realized that the argument is speculative in the extreme. All things considered, the case for the lesser offence is far from closed. The second point regarding the strength of the subjectivist position lies in the nature of the injustice alleged to occur in the punishment for unreasonable mistake, for who is the accused who will make a mistake which is totally unreasonable? The cause of the belief in consent is all important. If the cause is insanity or drunkenness, then the excuse is confined to the legal doctrines apposite to those excuses, and whether or not the appropriate legal doctrine is defensible is not the concern of this discussion.

There has been some discussion, in the context of the range and definition of the concept of recklessness, of the accused who acts in a fit of temper, without thinking of the risk of his or her behaviour,

294. Mitchell, *supra*, note 27 at 8-9.
295. Temkin, *supra*, note 1 at 418-419.
296. Heilbron, *supra*, note 13 at para. 79.
297. Wells, *supra*, note 152 at 213.
298. Heilbron, *supra*, note 13 at para. 79.
299. Wells, *supra*, note 152 at 212.

or of anything else, for that matter.[300] But that is not the hard case. The hard case is the one in which the final decision is that either the accused did not live up to the standard which the jury expects from the reasonable person, and did so for some reason which might as well be called stupidity as anything else, or the accused is telling the jury a pack of lies. The members of the jury, of course, must decide between the two alternatives, but what if they opt for a reasonable doubt on the former — that is, they decide that the accused did not know that the other did not consent, but there is no reason for that belief? It seems silly and pointless to punish a person for being less than a jury would wish him or her to be. Hall stated that:

> To declare that a person had the competence to be sensitive to ordinary dangers is a tautology, since competence is or includes that quality. In other terms, is one to be blamed because one is not normally sensitive to ordinary danger or to a duty to attend to such danger? The statement of the issue, in terms relevant to penal liability, also reveals the superficiality of determining this difficult factual problem in a courtroom. For, as regards the determination of the sensitivity to social values and the possibility of danger, a quick glance at the education, vocation, and mentality of the negligent person leads only to guesswork. The result is strict penal liability, not punishment based on fault.[301]

This is hardly a new problem in the operation of the criminal law, particularly in the context of the application of an objective element in true defences for criminal offences, such as self defence, provocation, and duress. Pickard, in her espousal of some kind of objective element in the assessment of culpability in rape, acknowledges the force of the problem, and concludes that:

> The appropriate way to handle this kind of unfairness is to modify the traditional measure of reasonableness. It is entirely possible to take the relevant characteristics of the particular actor, rather than those of the ordinary person as the background against which to measure the reasonableness of certain conduct or beliefs. The fact finder must ask whether or not the belief was reasonably arrived at in the circumstances, given those attitudes

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300. See, for example, discussion of *Parker*, *supra*, note 162 by Glanville Williams, *supra*, note 15 at 77-80; Colvin, *supra*, note 82 at 364; Syrota, *supra*, note 161 at 100.

301. Hall, *supra*, note 155 at 640. Accord: Glanville Williams, *id.*, at 46-47; Brinnig, *The Mistake of Fact Defense And The Reasonableness Requirement* (1978), 2 Geo. Mason L.R. 209 at 216-217; Hogan, *supra*, note 277 at 694; McEwan and Robilliard, *supra*, note 95 at 283; Colvin, *supra*, note 82 at 368.

> and capabilities of the defendant which he cannot be expected to control . . . this individualized standard is neither "subjective" nor "objective". It partakes of the subjective position because the inquiry the factfinder must conduct is about the defendant himself, not about some hypothetical ordinary person. It partakes of the objective position because the inquiry is not limited to what was, in fact, in the actor's mind but includes an inquiry into what could have been in it, and a judgment about what ought to have been in it.[302]

This concession finishes the objective position utterly, and is without any principle at all. If it has any meaning, it means that the jury is to be told that, if the accused is, in its opinion, guilty, then it should rationalize the situation as it will — he either knew or he ought to have known, and it does not matter which. If this is to be taken seriously, how then is anyone to distinguish the objective from the subjective test? That task is difficult enough in the context of the present interpretation of the concept of recklessness, but the discussion above has attempted to limit recklessness to a viable subjective concept, free of the more masochistic judicial tendencies to conflate recklessness and negligence. This must be something different, but what? The only analogous guide is the one cited by Pickard, namely, recent developments of the defence of provocation. In *Camplin*,[303] the House of Lords took an orthodox subjective position with respect to the objective component of the defence of provocation, and held that the ordinary reasonable person is to be given all the idiosyncracies of the accused in the evaluation of what his or her reaction ought to have been in all the circumstances of the individual case. How, then, does the reaction of the ordinary/reasonable person differ from the reaction of the accused? The answer, to date, has been that the former is sober and of reasonable temper.[304] The reason for the exclusion of the drunken reaction to provocation should be obvious to those who have followed the tortuous paths trodden by the judiciary in the rejection of the effects of alcohol as an excuse for anything.[305] The rationale

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302. Pickard, *supra*, note 17 at 79.
303. [1978] A.C. 705. See also *Rowen*, [1982] Crim. L.R. 51.
304. As to drunkenness, see *Wright* [1969] S.C.R. 335; *Perrault* [1971] S.C.R. 196; *Croft* (1981), 3 A. Crim. R. 307, (N.S.W.C.A.); *O'Neill* (1981), 4 A. Crim. R. 404, (V.C.A.). As to short temper, see *Mancini* [1942] A.C.I.; *Moffa* (1977), 13 A.L.R. 225, (H.C.); *Griffin* (1980), 23 S.A.S.R. 264, 2 A. Crim. R. 80.
305. *D.P.P.* v. *Majewski*, [1977] A.C. 443; *Leary* (1977), 33 C.C.C. (2d) 473 37 C.R.N.S. 60, 74 D.L.R. (3d) 103, (S.C.C.).

for the exclusion of the idiosyncracy of short temper is equally simple: to do otherwise would be to convert murder to manslaughter in any case in which the homicide was not planned or deemed by law. The exception of provocation would effectively swallow the rule.[306] The matter is easily tested. It is generally agreed that, where an accused has an abnormal sensitivity about his impotence, if such a thing is possible, the ordinary man should share that characteristic for the purposes of the law of provocation, and that *Bedder* contra should not be followed.[307] What is the difference between Mr. Bedder and the man who has abnormal beliefs about the generality of masochism among women? What is the difference between the objective and subjective positions if Pickard's formula is adopted, and what is the distinction between her position and a reasoned formulation of recklessness? It is submitted that any distinctions are purely arbitrary. The strength of the case for the subjective view is confirmed, rather than weakened, by this concession.

VII. *Conclusion*

There is no rapist's charter. The arguments in favour of an objective standard of liability for the consent element of rape are not convincing, and the arguments in favour of the restriction of liability to those who are aware that the other is not consenting are overwhelming. Present law, which, at the very least, subscribes in theory to the subjectivist orthodoxy, tends to distort the background theory to convict those who are perceived to be culpable, even if their cases lie in the border of reasonable doubt. The key to the state of the present law lies in a settled definition and a principled and reasoned application of the law of the developing concept of recklessness. That millenium has yet to be achieved. The positivists who would focus the almost exclusive concern of the criminal law upon the harm inflicted upon the person who has been subjected to sexual intercourse without giving consent would do well to examine the law on recklessness to see whether or not it is capable of conferring guilt upon those who truly deserve it, and whether or not

306. See Glanville Williams, *supra*, note 15 at 492, where he says that "the test of the reasonable man refers to the mental quality of normal self-control, not to physical characteristics."

307. *Bedder* [1954] 1 W.L.R. 1119, (H.L.). Glanville Williams, for example, submits that the case should no longer be followed, *supra*, note 15 at 492, and it is doubtful whether the decision has survived *Camplin*, *supra*, note 304.

it is capable of removing from the prison system those who do not deserve that ultimate retribution.

The dispute about culpability is really a dispute about what the law should require of men and women in their various sexual contacts, from traditional marital sexual relationships to so-called one-night stands. The regulation of sexual behaviour in the marginal cases, conditioned as it is by far more influential factors than the criminal law, is a minefield for those who would achieve social education by proscription. Moreover, the formulation of rules to deal with the almost infinite variety of human sexual experience is a task which requires far more than the espousal of such inflexible and insensitive requirements as the proposed requirement of advertence. Such requirements must balance the harm inflicted by nonconsensual sexual contact with the implementation of social policy that recognizes the absurdity of imposing rules of action that are at odds with the realities of human sexual behaviour in Canadian society. The formulation of rules of action in the criminal law of rape must make explicit what behaviour is considered intolerable, without attacking radically those views commonly held about what is and what is not accepted in the wide variety of possible situations. Whether the test for culpability is objective (what we would expect of ourselves) or subjective (what we would expect of the accused), in practice the law will reflect, in a rough way, the attitudes and beliefs of the society in which it operates; changing the rules is a very blunt and ineffective way of changing those attitudes, even if they are thought to be unacceptable. What is required is the exercise of formulating the rules of action, both as they are and as they should be; that exercise would begin the process of public education which is necessary for the creation of effective and defensible rape law.