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Abstract
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Keywords
Rape; Criminal intent; Sexual consent; Canada

HONEST BELIEFS, CREDIBLE LIES, AND CULPABLE AWARENESS: RHETORIC, INEQUALITY, AND *MENS REA* IN SEXUAL ASSAULT©

BY LUCINDA VANDERVORT*

The exculpatory rhetorical power of the term "honest belief" continues to invite reliance on the bare credibility of belief in consent to determine culpability in sexual assault. In law, however, only a comprehensive analysis of *mens rea*, including an examination of the material facts and circumstances of which the accused was aware, demonstrates whether a "belief" in consent was or was not reckless or wilfully blind. An accused's "honest belief" routinely begs this question, leading to a truncated analysis of criminal responsibility and error. The problem illustrates how easily old rhetoric perpetuates assumptions that no longer have a place in Canadian law.

La puissance rhétorique disculpatoire du terme « croyance sincère » continue à solliciter confiance, basée uniquement sur la crédibilité de la croyance au consentement afin de déterminer la culpabilité lors d'une agression sexuelle. Légalement, cependant, seulement une analyse complète du *mens rea*, comportant un examen des faits matériels et des circonstances desquels l'accusé était conscient, démontre si une « croyance » au consentement était ou n'était pas insouciante ou volontairement aveugle. La « croyance sincère » d'un accusé invoque couramment cette question, menant à une analyse incomplète de la responsabilité criminelle, et à une erreur. Le problème illustre comment la vieille rhétorique perpétue facilement des hypothèses qui n'ont plus leur place dans le droit canadien.

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* Associate Professor, College of Law, University of Saskatchewan. The author presented a draft of this article as a "work in progress" to the Feminism and Law Workshop, Faculty of Law, University of Toronto, February 14, 2003. Comments by participants and anonymous reviewers were valuable in preparing the final draft.

I. INTRODUCTION

The exculpatory rhetorical power of the term "honest belief" continues to invite reliance on the bare credibility of belief in consent to determine culpability, despite the 1992 amendments to the sexual assault provisions in the *Criminal Code*.[1] The consequence is error in analysis of criminal responsibility for the offence of sexual assault. The term "honest belief," and the cursory approach to analysis of *mens rea* it encourages, are ongoing sources of confusion and error for decision makers in the criminal justice system and for the public. This affects the decisions made by complainants and police and creates a risk of improper convictions and acquittals, violating equality rights, and defeating the public interest in the impartial administration of justice. Analysis of *mens rea* or culpable awareness must therefore shift its focus away from the accused's supposedly exculpatory belief to a detailed examination of the accused's awareness of material facts. With such an analysis, fewer decisions will depend solely on the bare credibility of the accused's purportedly exculpatory belief in consent. The effect will be to reduce the impact of bias and discrimination[2] on the handling of sexual assault cases at all stages of the Canadian criminal justice system.

This article argues that section 273.2 of the *Criminal Code* codifies the established common law doctrine governing *mens rea* in sexual assault, retains the requirement of proof of subjective fault in sexual assault, and is not in contravention of section 7 of the *Charter of Rights and Freedoms*.[3]

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[1] R.S.C. 1985, c. C-46 [*Criminal Code*].

[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. Section 273.2 is to be interpreted in a manner that renders it effective to protect the constitutional rights of accused persons and persons vulnerable to sexual coercion and exploitation, as proposed in the preamble to *An Act to Amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38 [*Act to Amend*], the act legislating these provisions. In this paper, that objective was pursued through close scrutiny of the actual practical effects of doctrine in context and a fundamental reexamination of the significance of culpable awareness for criminal responsibility. These approaches may prove fruitful in the analysis of other aspects of the criminal law within a framework of egalitarian principles.

[3] Professor Don Stuart discusses grounds for constitutional challenge of section 273.2 (a)(ii) in his *Brief on Bill C-49, An Act to Amend the Criminal Code (sexual assault)*, tabled 12 December 1991, 4 February 1992, at 7-19, and in "Sexual Assault: Substantive Issues Before and After Bill C-49" (1993) 35 Crim. L.Q. 241-63. Legal and political issues raised by the prospect of judicial examination of the 1992 legislation within a *Charter* framework are discussed by Rosemary Cairns-Way, "Bill C-49 and the Politics of Constitutionalized Fault" (1993) 42 U.N.B.L.J. 325-34.

Section 273.2 is construed as a restatement of existing law, enacted to clarify and reaffirm the scope of criminal responsibility in sexual assault, and to secure more effective enforcement of laws prohibiting sexual coercion.

II. SEXUAL ASSAULT AND "HONEST BELIEF" IN CONSENT IN RECENT CASES

In the years between the decision by the Supreme Court of Canada in *R v. Pappajohn*[4] in 1980 and the enactment of section 273.2 of the *Criminal Code*[5] in 1992, the "defence" of "honest belief" in consent came to be seen as a major obstacle to the effective enforcement of sexual assault law. By 1992, it was widely believed that a credible "honest belief" in consent is invariably a full "defence" to sexual assault—even when the belief is unreasonable—and that evidence sufficient to create reasonable doubt about knowledge of non-consent, and thereby negative a *mens rea* of criminal intent, "absolves" or "exonerates" the accused and requires acquittal. These assumptions appeared in general public discussions[6] as well as academic and professional materials[7] on sexual assault law written during the 1980s, and created strong support among women in Canada for the

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By contrast, this article interprets section 273.2(a)(ii) within the traditional framework of subjective liability and supports the Supreme Court of Canada's reading of the section as a codification of common law, consistent with the fundamental principles of criminal justice, and secure against the challenges Cairns-Way anticipated under sections 7 and 11 of the *Charter*.

[4] [1980] 2 S.C.R. 120 [*Pappajohn*].

[5] *Act to Amend*, *supra* note 2, s. 1.

[6] See *e.g. The War Against Women*, First Report of the Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women, House of Commons, Canada, June 1991, Recommendation 20 at 45, calling for "repeal of the defence of 'mistake of fact.'" The Report (*ibid.* at 44) states:

> Since 1980, it has been settled law in this country that an honest, unreasonable mistake as to non-consent could absolve an accused charged with sexual assault, as held by the Supreme Court of Canada in the *Pappajohn* case. Where an accused leads evidence that he was under a mistaken belief that a sexual act was consensual, the law allows him to use this as the basis for the defence that he did not commit the mental element of the offence.

[7] Don Stuart, *Canadian Criminal Law*, 2d ed. (Toronto: Carswell, 1987) at 247-50; Allan Manson, Annotation of *Sansregret v. R.* (1985) 45 C.R. (3d) 193 at 194; Toni Pickard & Phil Goldman, *Dimensions of Criminal Law* (Toronto: Emond-Montgomery, 1992) at B-191, B-267, B-483; See also Toni Pickard, "Culpable Mistakes and Rape: Harsh Words on *Pappajohn*" (1980) 30 U.T.L.J. 415. However, this defence often failed to persuade judges.

enactment of section 273.2[8] in 1992.

Section 273.2 creates a statutory bar[9] to reliance on a belief that the complainant consented as a defence.[10] After enactment of section 273.2 in 1992, however, some academic discussions of the significance of "honest belief in consent" for *mens rea* in sexual assault continued to assert the validity of many propositions that had dominated discussions in the 1980s.[11] This occurred despite the explicit assertion/affirmation by the Supreme Court of Canada that at common law an "honest belief" is exculpatory only if it is neither reckless nor wilfully blind.[12] Combined with related statements by the Court in recent decisions about section 273.2 and the relationships between "honest belief," "recklessness," and "wilful blindness," this makes it clear that the Court views section 273.2 as a codification of common law that is fully consistent with the law of *mens rea* in sexual assault as articulated by Justice Dickson, as he then was, in *Pappajohn*. These developments suggest that the interpretations of *Pappajohn* that caused widespread consternation in the 1980s, and continue to be influential, were based on a flawed appreciation of the legal significance of belief in consent for *mens rea* in sexual assault.

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[8] It is not a defence to a charge under section 271, 272, or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where (a) the accused's belief arose from the accused's (i) self-induced intoxication, or (ii) recklessness or wilful blindness; or (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; 1992, c. 38, s. 1.

[9] Section 273.2 does not create a defence but merely identifies circumstances in which the common law defence of "belief in consent" (mistake of fact) may *not* be used. The section is therefore a statutory bar. The circumstances listed in section 273.2 are not new grounds for disallowing the "defence" of belief in consent based on mistake of fact; all are recognized at common law and under section 265(4) as circumstances in which the defence is unavailable because it could not result in a lawful acquittal.

[10] "Mistake" about a material fact negatives *mens rea*, an element of the offence to be proven by the Crown; it is not an affirmative "defence" as such.

[11] See *e.g.* Don Stuart, *Canadian Criminal Law: A Treatise*, 4th ed. (Toronto: Carswell, 2001) at 280-310; Don Stuart, "*Ewanchuk*: Asserting 'No Means No' at the Expense of Fault and Proportionality Principles" [1999] 22 C.R. (5th) 39.

[12] See *R. v. Esau*, [1997] 2 S.C.R. 777 at 813 [*Esau*], where Justice McLachlin, as she then was, in dissent but not on this point, states that section 273.2(a)(ii) of the *Criminal Code* codifies the common law bar against reliance on the defence of belief in consent by any accused whose belief in consent is reckless or wilfully blind. See also *Esau*, (*ibid.* at 807-08, 813-17), which show that under the Canadian common law the analytic focus remains on the subjective awareness of the accused and that the "reasonable steps" provision in section 273.2(b) is to be read as an affirmation by Parliament of the common law prohibition against "wilful blindness," not the creation of an objective test. Those reasons, though written in dissent, deal with matters not addressed in the majority judgment by Major J.; they were subsequently followed by the Ontario Court of Appeal in *R. v. Darrach* (1998), 38 O.R. (3d) 1 (C.A.), Morden A.C.J.O. In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at 357 [*Ewanchuk*], Major J., writing the majority judgment, quoted and adopted the above referenced proposition from *Esau*, at 813 of the dissent by McLachlin J., as she then was, which Major J. describes as a statement by "the Court."

Experience with analysis of *mens rea* in sexual assault demonstrates that the rhetorical impact of terms used in legal analysis cannot, and should not, be ignored or discounted. The term "honest belief" continues to be widely used in the broad, unqualified lay sense of the 1980s and continues to have significant rhetorical force, despite the Court's clarification of the term. Old attitudes linger in relation to sexual assault and perpetuate the view that a "belief in consent" should always exonerate an accused. Indeed, use of the term "honest belief" often serves to beg the question of culpable awareness by diverting scrutiny away from whether the belief was reckless or wilfully blind.

The result is conclusory reasoning, truncation of analysis of *mens rea* in sexual assault, and errors that subvert justice in the courts. When these outmoded views of the law also influence police and prosecutorial decision making, the effects can be irreversible and tragic. The best evidence for the proposition that the analytic focus in determinations of criminal responsibility in sexual assault must shift from the accused's beliefs to the facts of which the accused was aware are cases in which analysis of culpability is truncated and conclusory as a consequence of an undue focus on "belief in consent."

III. *R. v. MACFIE*

R. v. MacFie[13] is one such case, providing compelling evidence that the doctrine of "honest belief in consent" continues to be a significant cause of confusion and serious error at the trial level. MacFie's wife left him, following a long history of physical and emotional abuse. In letters to her, he acknowledged that she was afraid of him and did not want to see him because he had abused her. Following many unsuccessful attempts to persuade her to see him, he abducted her and drove to a gravel pit south of Calgary. He parked, entered the back of his van, and had intercourse with her two times. When he took her back to her brother's house, the police were waiting. Her brother had noticed she was missing, found her shoe in the parking lot, and called the police.[14]

The next day she reluctantly provided the police with a written statement, recording that she feared what her husband would do if he found out that she had given a statement. Three days later her husband killed her. At trial, her written statement provided the only evidence of her

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[13] *R. v. MacFie (B.S.)*, [2001] 277 A.R. 86 (C.A.), McFadyen J. [*MacFie*]. The court allowed the Crown's appeal from the trial acquittal and entered a conviction.

[14] *Ibid.* at 88-89.

version of events.[15]

That statement explained that she had not consented but had "agreed" to have sexual intercourse with him only because she feared bodily harm.

> I went along with it because I was scared of what he would do if I tried to resist. I had sex with him and said things to him like "I loved him" and "I was sorry" because I thought if he stayed calm and happy he wouldn't hurt me.
>
> I told him I would have sex with him as it was the only was [sic] I could think of to keep him calm. I think I made him believe that it was what I really wanted too.[16]

In a police interview after his arrest for her murder, MacFie stated that she had initiated the sexual activity. He became angry at the mention of the sexual assault allegation and said that if she made such an allegation to the police, she deserved to die, and he would do the twenty-five years.[17]

At trial, MacFie plead guilty to abduction and other offences, and not guilty to charges of sexual assault and first-degree murder. He did not testify, and was convicted of first-degree murder, but acquitted on the sexual assault charge.[18] The trial judge held that although MacFie violently abducted his estranged wife and had sexual intercourse with her without her consent, he was not liable to be convicted of sexual assault because he "truly and honestly believed that she was consenting to the activity."[19] *Sansregret v. The Queen*[20] and *R v. Osolin*,[21] in which the accused's awareness of lack of voluntariness in "consent" was also at issue, were not mentioned by the trial judge.[22]

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[15] *Ibid.*

[16] *Ibid.* at 88.

[17] *Ibid.* at 89.

[18] *Ibid.*

[19] *Ibid.* at 91.

[20] [1985] 1 S.C.R. 570 [*Sansregret*]. See *infra* notes 36-48 and accompanying text.

[21] [1993] 4 S.C.R. 595 [*Osolin*].

[22] Police policy and protocols on domestic violence, abduction, kidnapping, and sexual assault, did not result in the arrest of MacFie until after he murdered his estranged wife, Carol Meredith. The police issued a warrant for MacFie's arrest when she reported her abduction from her brother's home in Calgary. She then fled Calgary in an attempt to escape further harm. But three days later, before the RCMP found him, MacFie found her at her sister's home in Cold Lake, Alberta. "Sentence Adds Years to Killer's Term" *Calgary Herald* (11 October 2001) A5. Again he abducted her, supposedly in a rage over the sexual assault allegation. Her body was found a week later. "MacFie confessed to

The reasons for judgment by Justice McFadyen, for the Alberta Court of Appeal, on the appeal in *MacFie* stated the Crown's position:

> an accused person who violently abducts his victim cannot rely on the defence of honest but mistaken belief in consent where that victim, by reason of fear, seeks to persuade the abductor that she agrees to the sexual activity he proposes. ... [T]he abductor cannot escape his knowledge of the circumstances in which the victim came to be with him and the consequent finding of recklessness or wilful blindness which must arise from those circumstances.[23]

In the reasons for judgment in *MacFie*, the Court of Appeal agreed with the Crown and held:

> while the abduction continues, the perpetrator of the abduction cannot assert an honest belief in consent. Honest belief cannot exist in circumstances of wilful blindness or recklessness and the perpetrator of a violent kidnapping or abduction can have no illusions about the voluntariness of any expression of consent. [24]

In the interval between the trial and the appeal, the Supreme Court of Canada rendered its decisions in *Ewanchuk*[25] and *Davis*.[26] In all other respects, the principal authorities available to both levels of court were the same. The discussion of section 273.2 by Justice McLachlin, as she then was, in dissent in *Esau*,[27] was available, but not cited by the trial judge.[28] Instead, the trial judge directed his attention to the wife's statement that she believed she had convinced the accused that she consented. The trial judge did not consider the social context—the violent relationship and the abduction—and its implications for voluntariness.[29] By contrast, Justice McFadyen focused more broadly on context and held, correctly I submit, that the trial judge erred in law in finding an "air of reality" for the defence

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attack—Mountie" *Calgary Herald* (6 May 1998) A4. Cases like *MacFie* explain why many women believe the rule of law often has little practical relevance for protection of their personal security, and see the options to be submit, resist, escape, and when those options are impossible or fail, self-help. At the time of MacFie's trial, one of Carol Meredith's brothers was an eighteen year RCMP veteran. "Murder trial begins" *Calgary Herald* (4 May 1998) A12. This woman was not a socially marginalized person, but the police did not succeed in protecting her. She died a horrible death.

[23] *Supra* note 13 at 87.

[24] *Ibid.*

[25] *Supra* note 12.

[26] *R. v. Davis*, [1999] 3 S.C.R. 759 [*Davis*].

[27] *Supra* note 12.

[28] *MacFie, supra* note 13. The acquittal by Sanderman J. on the sexual assault charge was May 12, 1998.

[29] *Ibid.* at 91.

of belief in consent without considering the evidence of circumstances relevant to the issues of recklessness and wilful blindness.[30]

The appeal courts will undoubtedly have other opportunities to revisit these issues. In doing so, the courts should avoid language that evokes stale understandings of the law in this area. More than semantics is at issue here.[31] It has long been the case that where there is evidence to suggest an accused may have believed there was consent, the spectre of conviction of the "morally innocent" arises; that alone is widely seen to be good and sufficient reason to acquit. This response, as shown at trial in *MacFie*, has long confounded clear analysis of culpability in sexual assault and enforcement of the law. In the background is the influence of ambivalence in Canadian culture towards characterization of sexual activity as assault.[32] In such a cultural climate, the mere suggestion of "moral innocence" easily suffices to truncate analysis and impede proper application of the law. To curtail reliance by decision makers in the criminal justice system on mere intuition and hunches shaped by cultural bias, we need a fully articulated analysis of "moral innocence" and "culpable awareness" in sexual assault.

IV. *PAPPAJOHN* AND ITS LEGACY: A CAUTIONARY TALE

The reasons for judgment in *Pappajohn* and *Sansregret* were crucial for interpretation of the law of *mens rea* for the offence of sexual assault in the period leading up to enactment of section 273.2 in 1992. Treatment of the doctrine of "honest belief" in these cases is therefore useful in interpreting section 273.2. These cases allow us to identify the conceptual and logical traps and snares that confounded analysis of the significance of "honest belief" for *mens rea* prior to the 1992 amendments, and provide compelling evidence of the ease with which the term "honest belief" subverts proper analysis of *mens rea*. The cases should therefore be read as a "cautionary tale"; this is an instance in which there is probably considerable truth to the adage that those who do not know history are doomed to repeat it, despite the measures taken in the interim to clarify the law.

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[30] *Ibid.* at 91-92.

[31] Were the issue "mere semantics," cases like *MacFie* would suggest that semantics require more attention. What is ultimately at issue here, however, is reconfiguration of legal consciousness in relation to issues of culpable awareness and criminal responsibility.

[32] Discussion of *Ewanchuk*, *supra* note 12, illustrates this ambivalence. See Joanne Wright, "Consent and Sexual Violence in Canadian Public Discourse: Reflections on *Ewanchuk*" (2001) 16:2 C.J.L.S. 173.

The legacy of *Pappajohn* is like a shadow at dawn—out of proportion to the thing itself. The reasons for judgment simply affirm that in a sexual assault case the accused is to be given the benefit of any reasonable doubt on the issue of *mens rea* that arises as a consequence of a credible claim of mistake of fact about consent, subject to the usual requirement that such a claim must be supported by evidence sufficient to give it an air of reality. This proposition is straightforward and does not suggest a revolution in the law of *mens rea* or the law of evidence in relation to *mens rea*. Had the Supreme Court of Canada intended to effect a major reinterpretation of the law of *mens rea* in *Pappajohn*, the reasons for judgment would have contained a searching analysis and discussion of the implications of such a reinterpretation. The judgment contains no such discussion, however, nor any other indication that the members of the Court had a doctrinal revolution in mind. Instead, the judgment simply affirms the applicability of established *mens rea* doctrine to the offence of rape, as it then was.[33]

All members of the Court, with the exception of Justice Martland, adopted the reasons in dissent by Justice Dickson, but with respect to one point only—that "mistake of fact" is a defence in sexual assault even if the mistake is "unreasonable." Justice Dickson, Justice Estey concurring, would have allowed the appeal on the ground that there was a sufficient basis in the evidence to support the possibility that Pappajohn had a mistaken belief in consent and the defence should have been placed before the jury. But Justice McIntyre, for the majority, held that on the evidence the sole issue was whether there was consent. The majority was not persuaded that there was a sufficient evidentiary basis for Pappajohn's claim of mistaken belief in consent; his appeal was not allowed. The legal point authoritatively determined in *Pappajohn*—that evidence supporting the possibility of honest mistaken belief in consent may negative *mens rea*, even when the mistake is unreasonable—is important for clarification of *mens rea* in sexual assault, but is, nonetheless, relatively innocuous, not revolutionary.

In *Pappajohn*, Justice Dickson states, "a mistake that negatives intention or recklessness entitles the accused to an acquittal."[34] But his

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[33] *Pappajohn*, *supra* note 4. Nevertheless, in the 1980s some appeal court justices curtailed recklessness as a meaningful aspect of culpability in *mens rea* offences by applying broad interpretations of the reasons by Dickson J., as he then was, in *Pappajohn*. This development purportedly reflected a change in interpretation of the law of *mens rea*, but as noted above, no such shift in *mens rea* doctrine is attributable to *Pappajohn*.

[34] *Ibid.* at 148. By contrast, *ibid.* at 146, Dickson J. said: "In summary, intention or recklessness must be proven in relation to all elements of the offence, including absence of consent. This simply extends to rape the same general order of intention as in other crimes." Commentators appear to have overlooked this remark.

reasons do not discuss the difference between the implications of mistake for a *mens rea* of intention and knowledge, as opposed to recklessness or wilful blindness. Nor do the reasons define "honest belief." Nonetheless, subsequently it was widely assumed that a mistaken belief negativing intention necessarily negatives recklessness. One commentator argued that if logic governs, mistaken belief must negate wilful blindness as well.[35] By contrast, I suggest that in using the phrase "intention *or* recklessness," rather than "intention *and* recklessness," Justice Dickson expressed himself imprecisely, inviting the very confusion that followed. Ironically, he appears to have simply quoted and then adopted the phrase "intention or recklessness" from a passage by Glanville Williams. In short, with hindsight it is clear that the dissent in *Pappajohn* lacked clarity.

Sansregret played a pivotal role in shaping subsequent judicial interpretation of the reasons for judgment in *Pappajohn*.[36] The trial judge in *Sansregret* observed that it was "a very odd case,"[37] though numerous studies document significant levels of domestic violence and coercion in Canadian society.[38] At trial in *Sansregret*, the apparent impediment to conviction for rape was the accused's "honest belief" that the complainant consented and that her consent was not the result of fear induced by his own violent behaviour. The trial judge described the accused as someone who demonstrated "clarity and shrewdness ... in securing his own safety" and then, influenced by "his own wishes," went "wilfully blind to the obvious shortly thereafter." She observed that the absence of meaningful consent due to fear would have been obvious to any one "in his right mind," but held that "the ratio of *Pappajohn* is clear and it leaves me no alternative but to acquit."[39] She appeared to view the legal rule to be that where the evidence supports the conclusion that the accused could have had an honest mistaken belief in consent, intention, recklessness, and wilful blindness are negatived, and the accused must be acquitted. She provided no original analysis of the legal implications of evidence of honest belief for culpable

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[35] See Manson, *supra* note 7 at 195.

[36] The courts at all levels in *Sansregret* contributed to subsequent confusion. When *Sansregret* was cited as binding authority on the relationships between mistaken belief, recklessness, and wilful blindness, the effect was often ambiguity.

[37] *R. v. Sansregret* (1983), 34 C.R. (3d) 162 at 163 (Man. Co. Ct.), Krindle J.

[38] Statistics Canada, *Victimization Survey* (1993); Statistics Canada, *General Social Survey* (1999); Ministers Responsible for the Status of Women, *Assessing Violence Against Women: a Statistical Profile* (Ottawa: Status of Women, 2002). Domestic violence cases often involve assailants who lack self-control and are angry or overwrought, and subsequently claim not to have perceived the circumstances, their impact on the victims, or the significance of the victims' conduct.

[39] *Supra* note 37 at 168.

awareness in the form of recklessness or wilful blindness, but clearly hoped the Crown would appeal her decision.[40]

In the appeal in *Sansregret*, the issue was whether the defence of mistake of fact was available in law. Justice Matas found the claim of "honest belief" in consent to have no "air of reality" in the circumstances,[41] while Justice Huband held that to be relevant the "honest belief" must relate to the impact of the threats and violence on the subsequent choices made by the complainant.[42] Both justices allowed the appeal and entered a conviction. Justice Philip dissented on the ground that the accused's "honest belief" that consent was genuine, not extorted, negated *mens rea*, and, therefore, the trial judge had not erred in law.[43]

In the Supreme Court of Canada, the majority in *Sansregret* invoked *Pappajohn*. Justice McIntyre adopted the view of Justice Huband that, in a case of extorted consent, *mens rea* is in relation to the effect of threats or fear of bodily harm. To operate as a "defence," the alleged "honest belief" must encompass belief that consent is voluntary, not the product of violence or threats of violence. The Court arguably invited confusion, however, when it adopted, without analysis, the proposition that an "honest belief" that an extorted consent was voluntary "would negate the *mens rea* under 143(b)(i) of the Code and entitle the accused to an acquittal."[44] Here the

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[40] Sansregret's awareness of the facts arguably provided ample support for a finding of *mens rea* on the ground of wilful blindness and recklessness. "Belief" was therefore irrelevant to the outcome, (see *infra* notes 56-62 and accompanying text). Similarly, the complainant's belief that Sansregret "honestly believed" that she "really" consented confirms neither the substance nor the "sincerity" of the accused's belief. The accused's attention likely focused on whether her attitude implied a threat to his safety and security, not on whether her consent and the reconciliation were voluntary. He may well have believed that she was back under his sexual or social control and he need not fear she would go to the police. These may have been his only concerns, and *both* of them might well have described his belief about what she would do in this regard as a belief that she "consented."

However, only voluntary consent is valid consent at common law. *Sansregret* thus provides what is arguably a classic example of reliance by an accused on a mistake of law. Section 19 of the *Criminal Code* prohibits reliance on ignorance of the law (and mistake of law) as an excuse to deny criminal responsibility. See *Criminal Code,* R.S.C. 1985 c. C-34, s. 19. The prohibition is of long-standing. Nonetheless, when *Sansregret* was before the courts in the early 1980s, prosecutors did not use mistake of law arguments in response to defences based on "mistaken beliefs in consent." See Lucinda Vandervort, "Mistake of Law and Sexual Assault: Consent and *Mens Rea*" (1987-88) 2 C.J.W.L. 233. The dissenting judgment by Fraser C.J. in *R. v. Ewanchuk* (1998), 13 C.R. (5th) 324 (Alta. C.A.), was the first Canadian judgment to apply the mistake of fact/mistake of law distinction to the defence of mistaken belief in consent. See also, Major J. in *Ewanchuk*, *supra* note 12 at page 356-57. It was also applicable, though not used, in *MacFie*, *supra* note 13.

[41] *R. v. Sansregret* (1983), 37 C.R. (3d) 45 at 48-53 (Man. C.A.).

[42] *Ibid.* at 54-57.

[43] *Ibid.* at 57-66.

[44] *Sansregret, supra* note 20 at 581.

term "honest belief" is used as if "honesty" excludes awareness of a risk that the complainant is not a voluntary agent. This illustrates the problems caused by use of the term "honest belief." Indeed, this aspect of the reasons for judgment in *Sansregret* provides a leading example of truncation and error in analysis of *mens rea* caused by the peremptory conclusion that the accused had an "honest belief in consent." *MacFie* exemplifies the same error at the trial level, confirming—as argued above—that conclusory reasoning has survived the 1992 amendments to the sexual assault provisions in the *Criminal Code*.

The possibility that an accused believed consent was voluntary will give rise to reasonable doubt as to culpable *knowledge*. Within the framework of subjective liability, however, recklessness requires not knowledge, but merely awareness of a risk and a choice to run th risk. Whether the attitude toward the risk is contempt, indifference, or thrill-seeking is unimportant. Given that knowledge that the circumstances are inculpatory is not required for conviction, it is quite possible for an accused, who may have indeed believed consent to be voluntary, to be convicted on the ground that he or she was nonetheless aware the belief might be mistaken. In other words, evidence of mistake of fact sufficient to support the possibility that the accused held an exculpatory belief, does not necessarily negate a *mens rea* of recklessness or wilful blindness.[45]

It is apparent that Justice McIntyre's reading of the facts in *Sansregret*, like that by Justice Huband in the court below, supported a finding of recklessness. Justice McIntyre stated:

> one would have thought that a man who intimidates and threatens a woman ... would know that the consent was obtained as a result of the threats. If specific knowledge of the nature of the consent was not attributable to him ... at the very least recklessness would be. ... [T]his case could have been disposed of on the basis of recklessness. The trial judge ... did not do so because of her application of the "mistake of fact" defence.[46]

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[45] Indeed McIntyre J., in a rarely quoted but significant passage in *Sansregret, ibid.* at 587, remarks that an accused may have "an honest belief, in the sense that he has no specific knowledge to the contrary" and yet not have a defence because he is "*deliberately blind*" [emphasis added]. See also Anthony Kenny, *Freewill and Responsibility* (London: Routledge & Kegan Paul, 1978) at 57-64 [Kenny]. In his critique of the ruling in *Director of Public Prosecutions v. Morgan*, [1975] 2 All E.R. 347 (H.L.)—that evidence of honest belief in consent, even an unreasonable belief, could negate the *mens rea* required for conviction—Kenny observes that although an honest belief in consent negatives intent to have intercourse without consent, such a belief "does not necessarily negate the intent to have intercourse willy-nilly, i.e. the intent to have intercourse *whether or not she consents*" (*ibid.* at 61). This is consistent with the view that an "honest belief" can co-exist with awareness that the belief may be mistaken.

[46] *Sansregret, ibid.* at 582.

Justice McIntyre then reviewed the "abundance of evidence ... on which a finding of recklessness could have been made."[47] But for Justice McIntyre's ruling that *Pappajohn* precluded conviction of Sansregret on the ground of recklessness, he likely would have affirmed the conviction on the ground that an honest belief in consent did not necessarily negate a *mens rea* of recklessness towards the validity of the consent.

Instead, Justice McIntrye used the alternate ground of wilful blindness to uphold the conviction in the case. This aspect of the reasons in *Sansregret* has been the object of much critical comment on the ground that wilful blindness, like recklessness, requires an awareness of risk. If one assumes that "honest belief in consent" precludes awareness of risk, it follows that credible evidence of "honest belief in consent" precludes finding that an accused made a deliberate choice to remain ignorant of the existence of the prohibited circumstance, absent consent. One influential Canadian commentator on the decision in *Sansregret* even argued that logical consistency demands that honest belief exonerates or absolves.[48] Were that true, the effect in general intent offences would be to define "an honest exculpatory belief" as a belief that is neither dishonest, nor reckless, nor wilfully blind. That is indeed now the effective definition in Canada at common law and pursuant to section 273.2—an "honest belief" is exculpatory only if it is neither reckless nor wilfully blind. In 1985, however, the emphasis was on the honesty (not defined) of the belief, and not on whether the belief was reckless or wilfully blind.

The decision in *Sansregret* stands. It has been much criticized on the ground that wilful blindness, like recklessness, requires awareness that consent may be absent or invalid, and must therefore, like recklessness, be

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[47] *Ibid.*

[48] Manson, *supra* note 7 at 195. But see Kenny, *supra* note 45 at 63, who observes, "an honest belief in consent is in no way incompatible with recklessness about consent; and if that is so an honest but unreasonable belief in consent will not always negate *mens rea* in rape." And further, "[i]t is surely perfectly possible that a man might believe that a woman consented while knowing, from the circumstances of the case, that there was a risk that she did not." It is thus apparent that the English and Canadian legal systems have struggled with similar controversies in relation to analysis of culpable awareness in sexual assault over the last three decades. In the instant context it should be noted, however, that Kenny, in writing the above quoted passages in 1978, used the term "honest belief" in the same loosely defined and equivocal manner in which it was commonly used by Canadian jurists prior to the 1997 decision in *Esau*. I suggest that the English experience with these issues confirms that the rhetorical impact of the phrase "honest belief" confuses jurists and interferes with proper analysis of *mens rea*.

In England and Wales, this problem continues. See *e.g. B. (A Minor) v. Director of Public Prosecutions*, [2000] 2 A.C. 428 (H.L.); *R. v. G & Another*, [2003] U.K.H.L. 50, 4 All E.R. 765, reaffirming a traditional "orthodox" subjective approach to *mens rea* (the latter repudiating the *Caldwell* approach to recklessness). To respond to public outcry over judicial treatment of *mens rea* issues in sexual assault cases, legislation was recently enacted—see *Sexual Offences Act 2003*, c. 42.

unavailable as a ground for conviction whenever there is evidence with "an air of reality" sufficient to support a claim of mistake.[49] The question that should be asked, however, is: Does evidence of mistake that supports an allegedly honest belief in consent, and is sufficient to negative a finding of intent to pursue a sexual activity with *knowledge of the absence of valid consent, also necessarily negative a finding that the accused was aware that consent might nonetheless be absent or invalid?* After the Supreme Court of Canada rendered its decision in *Sansregret*, members of the judiciary probably had limited opportunities to consider that question precisely because prosecutors, police, and persons advising potential complainants believed that the decisions in *Pappajohn* and *Sansregret* had resolved the issue.

R. v. Weaver is one of the few reported cases decided subsequent to *Sansregret* in which the Crown appealed following an accused's successful use of a defence of honest mistaken belief in consent. The Court of Appeal observed that the trial judge's conclusion that the accused may have had an honest belief in consent was "a remarkable finding."[50] Nonetheless, the

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[49] "Recklessness," discussed here, is "advertent recklessness," not "recklessness" based on an objective test. In a case comment on the Supreme Court of Canada decision in *Sansregret*, Professor Allan Manson states, "An exculpatory mistake of fact requires a finding of honest belief, which cannot coexist with a concomitant conclusion that the accused was wilfully blind as to the element in issue. The former is an honest but mistaken belief in whiteness, while the latter is a strong suspicion—deliberately unconfirmed—of blackness." See Manson, *ibid.* at 195. This comment is widely quoted in discussions of the case and continues to be influential in shaping comments in the literature about belief in consent under Canadian law. See *e.g.* Don Stuart, "*Ewanchuk*: Asserting 'No Means No' at the Expense of Fault and Proportionality Principles," Case Comment (1999) 22 C.R. (5th) 39 at 48. I submit that the Manson approach rests on a simple tautology, valid by definition if the meaning of each element of the equation is strictly observed. When decision makers try to use it as a guide in deliberating about the evidence, conclusory reasoning and error often result.

Infra notes 57-62, 70-72, and 94-95, I argue that a focus on awareness of facts is preferable because it will result in verdicts based on evidence of the accused's culpable awareness rather than on the credibility of exculpatory beliefs. Determinations of credibility are subject to influence by prejudice and are arguably a source of discrimination in the criminal justice system. Decision makers who regard the credibility of "honest beliefs" as determinative may give only cursory attention to the balance of the evidence. Over time, the result may be a set of working assumptions, a courthouse culture that tends to deny socially disadvantaged accused equal protection of the law at each successive decision-making point in the criminal justice process. This phenomenon may be a partial explanation for the disparity between the "cleared by charge" rates in sexual assault cases in New Brunswick (38 per cent) and the Northwest Territories (72 per cent), reported in data from 1988. See Scott Clark & Dorothy Hepworth, "Effects of Reform Legislation on the Processing of Sexual Assault Cases" in Julian V. Roberts & Renate M. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 113 at 126. See also the comments of Allan Manson in Allan Manson & Tom Quigley, "Bernard on Intoxication: Principle, Policy and Points in Between-Two Comments" (1989) 67 C.R. (3d) 168 at 178, for an example of an attack on an accused's credibility in response to the assertion of an honest belief in consent.

[50] *R. v. Weaver* (1990), 110 A.R. 396, 80 C.R. (3d) 396 (Alta. C.A.) at 400 [*Weaver* cited to C.R.].

court deferred to the trial judge on this issue and upheld the acquittal, describing the Crown's claim that the trial judge erred in law in ruling that the defence of mistaken belief in consent was available on the facts of the case as "an invitation to retry the case on its facts, a process not open to us. It was another example of the beguiling way in which a question of fact may be disguised as a question of law."[51] The Crown did not appeal further.

In its 1998 decision in *Ewanchuk*, the Alberta Court of Appeal followed its decision in *Weaver*, again rejecting the Crown's argument that on the facts of the case a defence of mistaken belief in consent was unavailable in law, and upheld the acquittal at trial. In *Ewanchuk* however, the Crown appealed, and the Court of Appeal was overruled by the Supreme Court of Canada, affirming that the availability of a defence is an appealable question of law.[52] The effect is to affirm that the discretion of judges to characterize questions of law as questions of fact, and thereby insulate trial verdicts from appellate review, is limited as a matter of law.[53]

By contrast, the effect of the 1990 appeal decision in *Weaver* was to confirm that when there was evidence to support a belief in consent, however unreasonable, the result might be acquittal, not subject to appeal. This would have encouraged police and prosecutors to assume that any evidence giving an "air of reality" to a claim of "honest belief in consent" was sufficient reason to decline to prosecute a sexual assault case. Prosecutors do not proceed to trial unless a conviction appears "likely," and judges only hear cases brought to trial. Complaints based on evidence that provided some support for an accused's claim of belief in consent were probably more likely to be classified as "unfounded" or "cleared without charge." These factors would have ensured that after the decisions in *Pappajohn* and *Sansregret*, judges had limited opportunities to reconsider the implications of honest mistaken belief in consent for culpability in sexual assault.[54] Moreover, between 1985 and 1992, the exculpatory effects

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[51] *Ibid.* at 399.

[52] *Supra* note 12 at paras. 21-22, referring to *Belyea v. The King*, [1932] S.C.R. 279 at 296, Anglin C.J..

[53] But for the decision on this point in *Ewanchuk*, the Crown might not have appealed the acquittal at trial in *MacFie, supra* note 13.

[54] Review (by the author) of reported cases decided in the years between 1980 and 1992 shows that some cases involving the defence of "belief in consent" did proceed to trial. Yet judges seized with these cases rarely appeared impressed with the evidentiary support for belief in consent and usually categorized them as cases in which the belief in consent defence was unavailable and the only issue was consent. On appellate review, convictions in these cases tended to be upheld, on the ground that the evidence provided no "air of reality" to the belief. *Weaver, supra* note 50, discussed in the text accompanying *supra* notes 50-53, is exceptional. In *Weaver*, a mistaken belief in consent led to an acquittal at trial, upheld on appeal. This was unusual. In many cases involving some actual evidence to

of honest beliefs, in general, were not closely scrutinized by judges. When analyzing the implications of honest belief in the existence of exculpatory circumstances for *mens rea* in offences other than sexual assault, judges often simply applied what they referred to as the *Pappajohn/Sansregret* "doctrine."[55] Crown counsel were probably reluctant to relitigate these issues during that period.

The evidence thus suggests that the implications of "honest belief" for *mens rea* in sexual assault confounded many Canadian jurists, academics, and lawyers in recent years. I suggest that much of the confusion was due to a lack of precision in the definition and use of the phrase "honest belief," which allowed non-legal rhetorical overtones to subvert the law. If jurists adopt clear definitions and use them systematically, it should now be possible to close that chapter in Canadian legal history. Errors in the characterization of questions of fact and questions of law that affect rulings on availability of the defence of belief in consent under section 265(4) are appealable questions of law.[56]

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support "mistake" no charges would have been laid. In the event of charges and a trial leading to acquittal on the ground of "mistake of fact," the Crown generally would not have appealed.

The primary effect of the "honest belief doctrine" was thus probably not at trial or on appeal, but instead as it increased the proportion of complaints labeled "unfounded," "cleared without charges," or not prosecuted, because police or prosecutors believed that the accused's claim of either consent or an honest belief in consent was likely to provide a "credible defence" and therefore the charge was "not likely" to result in conviction. This may be a partial explanation for what appear to have been comparatively low rates of reporting, classification as "founded," and prosecution in rape cases. Complete statistics for this period are not available, but see R. Gunn & C. Minch, "Unofficial and Official Response to Sexual Assault" (1985-86) 14 Resources for Fem. Research 47, reporting on attrition rates; Julian V. Roberts & Michelle G. Grossman, "Changing Definitions of Sexual Assault: An Analysis of Police Statistics" in Roberts & Mohr, *supra* note 49, 57 at 57-83, reporting an increase in the cases reported to police after the 1983 reforms to the sexual assault laws; and Scott Clark & Dorothy Hepworth, "Effects of Reform Legislation on the Processing of Sexual Assault Cases" in Roberts & Mohr, *supra* note 49, 113 at 113-35, reporting no change in the percentage of cases classified as "founded" or "cleared by laying of a charge" (*ibid.* at 126) despite the increase in complaints in 1983 and subsequent years. Roberts & Mohr noted that change in the law does not ensure that social and professional reaction will change (*ibid.* at 57). The Statistics Canada Victimization Survey (1993) found that about 94 per cent of sexual assaults are unreported; 40 per cent of reported cases result in charges; of those, about two-thirds result in convictions. And see Jeanne Gregory & Sue Lees, "In Search of Gender Justice: Sexual Assault and the Criminal Justice System" (1994) 48 Fem. Rev. 80. Overall, studies suggest that the criminal justice system's handling of reported sexual assault cases was slow to change following the 1983 reforms and change did not occur uniformly.

[55] See *R. v. Sandhu* (1989), 50 C.C.C. (3d) 492 (Ont. C.A.) and *R. v. Zundel* (1987), 31 C.C.C. (3d) 97 (Ont. C.A.).

[56] *Supra* notes 52, 53, and accompanying text. The position advanced in this article should be applicable whenever a purportedly exculpatory belief based on mistake of fact is raised to negative *mens rea* in a general intent offence; a detailed examination of the doctrinal implications for offences other than sexual assault is beyond the scope of this article.

V. CULPABLE AWARENESS AND BELIEF: A RESTATEMENT

Under present law, culpability in sexual assault is not grounded on the sexual activity as such, but on the choice to undertake the activity despite awareness that the circumstances are or may be inculpatory, or, in other words, a choice to act with knowledge of non-consent or without knowledge of consent. Where an accused's knowledge of consent is equivocal—a mixture of belief that there is valid consent and awareness that this may not be the case—fault or blameworthiness does not attach to the accused's uncertainty about consent, but rather to the decision to engage in the sexual activity despite awareness of that uncertainty. Reliance on a belief that is neither duplicitous, reckless, nor wilfully blind (and thus free of any practical possibility of error) that "voluntary agreement" or consent has been communicated by a person acting with legal capacity is not blameworthy. In such a case, there is no culpability for sexual assault, unless the circumstances vitiate the validity of communicated consent, and the accused is reckless or wilfully blind towards the impact of those circumstances on the voluntariness of the agreement or the capacity of the complainant, or is mistaken about what constitutes "consent" in law pursuant to section 273.1.

The common law proposition underlying the provisions enacted in section 273.2 is that evidence of a belief in consent, sufficient to negative proof of intent to assault by raising reasonable doubt that the accused knew there was no consent, does not necessarily negative recklessness or wilful blindness, subjectively determined, with respect to consent. Whenever the defence is belief in consent, the crucial issue to be determined is whether the accused was aware of a fact inconsistent with voluntary communication of valid consent. If the accused was aware of such a fact, any belief in consent was reckless or wilfully blind, at best. Such a belief affords the accused no defence, and therefore its credibility is irrelevant to the legal outcome—no matter what fond (or self-serving) beliefs or hopes about consent the accused had.

These propositions are sound, empirically and in law. A belief can, and often does, coexist in consciousness with awareness that the belief may be mistaken. This is a simple and uncontroversial statement of fact about the cognitive capacity of human beings.[57] Law requires adults to utilize their

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[57] See Josef Perner, *Understanding the Representational Mind* (Cambridge: MIT Press, 1991) on the development of cognitive abilities and evidence that the typical four year old child is able to appreciate that the content and referent of mental states may not match one another, the content of a belief may not represent reality, and a belief may be "false." Paradoxically, young children may examine their beliefs more frequently than some adults do because children are still constructing a basic view of the world. Children may therefore rely on entrenched habits and assumptions about their

capacities for critical examination of their beliefs when the actions they take or fail to take in reliance on those same beliefs affect the legally protected interests of other persons. This is a non-controversial legal proposition. It is therefore apparent that a "mistaken belief" in consent does not necessarily "absolve" or "exonerate" an accused charged with sexual assault.[58] If the legal significance of the facts of which the accused was aware is inconsistent with the proposition that the complainant communicated[59] consent to the sexual activity, voluntarily, and with full legal capacity, the accused is liable to be convicted. A finding that the accused may have also had a "mistaken belief in consent" does not alter the result.[60] On examination, moreover, such a belief will often prove to be a mistake about the law of consent, not a mistake about the facts.

Mens rea in sexual assault thus depends on the accused's subjective awareness of material facts, not the accused's beliefs. Material facts are primary—they provide the foundation for beliefs, including beliefs about material circumstances, such as the presence or absence of valid consent. Beliefs are secondary—they may be well-grounded and correct, or only partially validated and mistaken. Failure to appreciate the legal significance of known facts in forming a belief about consent is a mistake of law, not an excuse.[61] The accused person, whose sole defence is to allege that he or she

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environment and other people less often than many adults do. Yet, despite their reliance on habituated patterns of thought, adults remain capable of the complex cognitive behaviour required to test and revise beliefs and they often use this capacity when they are in situations they recognize as "risky" or otherwise uncertain. See also Kenny, *supra* notes 45, 48.

[58] Availability of the mistake of fact defence is a question of law. There must be some evidence to support the claim of mistake and the mistake must have an "air of reality" in the whole of the circumstances. See *Osolin*, *supra* note 21; *R. v. Park*, [1995] 2 S.C.R. 836 [*Park*]; Emily Steed, "Reality Check: The Sufficiency Threshold to the Air of Reality Test in Sexual Assault Cases" (1994) 36 C.L.Q. 448-73; and, more recently, the review of the "air of reality" test as a test for sufficiency of the evidence in relation to a number of defences over the last couple of decades, in *R. v. Cinous*, [2002] 2 S.C.R. 3. See also *R. v. Fontaine*, [2004] 1 S.C.R. 702 [*Fontaine*], Fish J., applying *Cinous*.

[59] *Park*, *ibid.* at 57, L'Heureaux J., adopted by Major J. in *Ewanchuk*, *supra* note 12 at 353-55. See also Stephen G. Coughlan, Annotation of *R. v. Ewanchuk*, [1999] 22 C.R. (5th) 1 at 6.

[60] See *R. v. Théroux*, [1993] 2 S.C.R. 5 [*Théroux*], involving the analogous question of whether an honest belief that financial deprivation would not be a consequence of an investment project, is a defence to fraud charges under s. 380(1)(a). Writing for the Court, McLachlin J., as she then was, stated: "the inference of subjective knowledge of the risk can be drawn from the facts as the accused believed them to be" (*ibid.* at 21). Belief that no loss will occur is irrelevant for culpability (*ibid.* at 25-26).

[61] *Esau*, *supra* note 12 at 807-08; *Ewanchuk*, *supra* note 12 at 356-57; *Criminal Code*, *supra* note 1, s. 19. See also Vandervort, *supra* note 40, arguing that some beliefs are mistakes about what the law of consent is, or about how it is be interpreted and applied to the facts. As a matter of law, such beliefs do not excuse the accused; they are mistakes of law, not fact. The result is to limit the range of cases in which the "defence" of mistake of fact is applicable and to ensure that the legal definition of consent

relied on a belief in "consent" defined other than as in law, has made a mistake about the law and is liable to be convicted.[62]

The assertion that a mistaken belief about the circumstances material to an essential element of a general intent offence does not necessarily preclude a finding of culpability on the ground of recklessness or wilful blindness, thus flows directly from fundamental principles of criminal law. This is the basis for the statutory bar in section 273.2 against availability of the defence of belief in consent when the belief is due to recklessness or wilful blindness. An individual who believes the other party is a willing participant, but who knows that communication of consent (that is, voluntary agreement, by words or conduct) is ambiguous, can hardly be said to lack awareness (in the absence of incapacity) of that fact. If that individual nonetheless chooses to engage in sexual activity with the other person, he or she acts with what the law defines (at best) as a "reckless" state of mind and therefore has the *mens rea* or subjective fault required in law for conviction of sexual assault. Likewise, the individual who perseveres without inquiry, though aware of reason to suspect that consent, though communicated, may not be voluntary or capable, is liable to be convicted on grounds of wilful blindness. In each case, *mens rea* is subjectively determined. By barring reliance on the defence of belief in consent where the belief is due to the accused's recklessness or wilful blindness, section 273.2 ensures that when a belief in consent is raised in defence of an accused, the accused's subjective awareness of the material facts is analyzed in accordance with the law of *mens rea* in sexual assault and verdicts are not pre-determined by the credibility of the alleged belief in consent.[63] To permit an accused to rely on a reckless or wilfully blind belief in consent would invite error. Section 273.2 precludes that eventuality.

Belief in consent to sexual contact remains a common law defence based on the defence of mistake of fact, not a statutory "defence."[64] Sections 265(4) and 273.2 do not change the substantive law, but instead

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is applied.

[62] *Ewanchuk, ibid.* at 356-57.

[63] See Manson in Manson & Quigley, *supra* note 49 at 178, for an example of an attack on an accused's credibility in response to the assertion of an honest belief in consent. By contrast, I suggest that reliance on the bare credibility of an accused's belief in consent can only exacerbate the effects of bias and undermine impartiality in the administration of justice.

[64] Section 265(4) of the *Criminal Code*, *supra* note 1, codifies the common law test for sufficiency of evidence (used to determine the availability of a defence in law) and provides jury instructions for cases where the credibility of an accused's assertion of honest belief must be assessed; the subsection does not "enact" a "statutory" defence of honest belief. Similarly, s. 273.2 is not a codification of *mens rea* in sexual assault but rather a statutory bar stating when the common law defence of belief in consent is *not* available as a matter of law.

provide instructions that should reduce the errors that occur in sexual assault cases when judges and triers of fact, distracted by the subject matter, deviate from ordinary procedures and reasoning in the deliberation process. The proposition that, but for the enactment of section 273.2, a belief in consent would completely exonerate or absolve an accused charged with sexual assault at common law, does not withstand scrutiny. A mere belief in consent always was a "bad excuse." It still is. The Supreme Court of Canada is quite clear on this point.

In *Esau*, Justice McLachlin, as she then was (in dissent but not on this point), observed:

> A person is not entitled to take ambiguity as the equivalent of consent. If a person, acting honestly and without wilful blindness, perceives his companion's conduct as ambiguous or unclear, his duty is to abstain or obtain clarification on the issue of consent. This appears to be the rule at common law.
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> I note that Parliament has affirmed this common sense proposition in enacting s. 273.2, which states that "[i]t is not a defence to a charge [of sexual assault] that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where ... the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting." ... The question is whether the defendant at bar, properly attentive to the issue of consent (i.e., not wilfully blind), could have, in the light of the ambiguity, honestly concluded that the complainant had the capacity and was consenting to the sexual activity.[65]

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[65] *Supra* note 12 at 813-14. I suggest it is unlikely an accused could fail to take steps to ascertain consent that were "reasonable," in view of the facts of which he or she was aware, and *not* be reckless or wilfully blind towards consent. An accused will inevitably be barred from reliance on belief in consent pursuant to s. 273.2(a)(ii) and (b) of the *Criminal Code*. Section 273.2(b) provides a formula for use in determining whether the accused was "wilfully blind." When the accused fails to ascertain consent, despite awareness of facts inconsistent with valid consent as defined in s. 273.1, a belief in consent is wilfully blind, at best, and not available as a defence. When none of the conditions set out in s. 273.2 apply to bar reliance on a defence of belief in consent, the principles of subjective liability in sexual assault at common law are applied to assess culpability. Typically, a trial judge will be able to determine whether the "air of reality" test in s. 265(4) is met and the defence is available, by applying the legal definitions of recklessness and wilful blindness to the evidence viewed in the light most favourable to the accused. If the test is not met, that is the end of the matter—the defence is not available. If the test is met, the "reasonable steps" provision in s. 273.2(b) provides the trier of fact with a formula (comparable in function to the "reasonable grounds" formula in s. 265(4)) to use in determining whether the evidence shows the accused to have been wilfully blind, in fact, towards the issue of consent, and thus culpably aware and therefore clearly not entitled to rely on the defence of belief in consent. (The test remains subjective, see text accompanying *infra* note 99.) Section 273.2 is therefore not a statutory definition of the mental element in sexual assault, but rather a statutory bar against availability of the defence of belief in consent that is based on, and wholly consistent with, the common law. The mental element for culpability in sexual assault remains uncodified, governed by common law principles of subjective liability. The statutory bar functions to curtail error by prohibiting consideration of belief in consent precisely when it is unavailable at common law.

Justice McLachlin also stated that a belief that is reckless or wilfully blind does not have an exculpatory effect at common law or as codified in section 273.2(a)(ii).[66] This way of viewing the question reverses the previous emphasis on the credibility of the alleged "honest belief" and arguably dictates a fundamental change in how analysis of *mens rea* is to proceed. Henceforth, the crucial question is whether the accused was reckless or wilfully blind. Only an accused who is neither can be said to have an "honest belief" in consent as an exculpatory circumstance, because "honest belief" has no practical legal meaning in this context other than "a belief that is neither reckless nor wilfully blind." To undertake sexual activity with awareness that consent may not be voluntary and capable is to choose to act with awareness that one is ignorant of a material circumstance. To do so, though aware that the words and conduct communicating consent were ambiguous, is to choose to act with wilful blindness, aware that one's actions are reckless, at best. In either case, the sexual activity is unjustifiable (as a matter of law) and, in both cases, the choice to undertake it is as blameworthy as to do so with knowledge of express refusal. This conclusion is neither novel nor revolutionary, but flows directly from a simple application of general principles of subjective liability to the elements of the offence of sexual assault, a general intent offence.

Two years later, writing for the Court in *Ewanchuk*, Justice Major adopted the above noted position taken by Justice McLachlin in *Esau* and stated: "to be honest the accused's belief cannot be reckless, willfully blind or tainted by an awareness of any of the factors enumerated in subsections 273.1(2) and 273.2."[67] This statement of the matter emphatically reaffirms that the dominant analytic focus has flipped. The crux of the matter in analysis of *mens rea* is not, "Did the accused have an 'honest belief in consent'?" Instead the crucial question is, "Was the accused aware of any reason to believe or suspect that consent was not present or not voluntary, that the complainant lacked capacity, or that consent was tainted by any of the factors enumerated in section 273.1(2) or vitiated at common law pursuant to section 273.1(3)?" Culpability does not depend on the credibility and sincerity of an accused's beliefs, but on the accused's awareness of the facts material to the voluntary, capable communication of consent as defined in section 273.1. A belief in consent, though credible and perhaps even "actually," "sincerely,"or "genuinely" held by the accused, may nonetheless be reckless or wilfully blind and therefore neither

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[66] *Esau, supra* note 12 at 813; see also *Esau, supra* note 12 at 807-08, 813-17; and *Théroux, supra* note 60.

[67] *Supra* note 12 at 361. The relevant section is 273.1(2). Section 273.2 enumerates no such factors.

exculpatory, nor "honest," within the meaning of the common law.[68]

There is a risk, however, that the term "honest belief" will continue to be used as it was in the 1980s and 1990s. The result will be the same old errors in analysis of *mens rea*. The decision at trial in *MacFie* dramatically exemplifies this phenomenon.[69] The errors, with one variation or another, will occur as follows. The decision maker will first determine whether the belief in consent might have been "honest," in the lay sense of "sincere," "actual," or "genuine." If so, the decision maker may assume, without further consideration of the evidence, that the accused cannot be convicted on the ground of either recklessness or wilful blindness and must be acquitted. In an indeterminate number of cases, this will be a false assumption; the accused will have been aware of facts and circumstances that are inconsistent with the communication of consent, voluntariness, or legal capacity as defined in law.[70]

A fresh approach to analysis of culpability in sexual assault is required to avoid such errors. Any approach that gives "belief in consent" a pivotal role in analysis of the evidence will tend to evoke the old paradigms and will often result in truncation of the analysis of *mens rea*. Only a focus on awareness of facts can ensure a full analysis of *mens rea* in relation to consent as defined in section 273.1. Because the accused is now understood to be deemed to appreciate the legal significance of the facts of which he or she is aware,[71] it can no longer be assumed that culpability is mediated by "beliefs about consent." Rather culpability must be understood to be based on the accused's choice to commit the *actus reus* with awareness of the facts material to consent as defined in section 273.1. An accused's "beliefs about consent" may well be inconsistent with the legal definition of consent and the accused may be unaware that his or her actions violate the law. This may be a consideration in sentencing, but—subject to limited exceptions that do not apply to sexual assault—an accused's mistaken beliefs about the law are never relevant to deliberations about culpability.[72] Culpability is based on the accused's subjective

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[68] *Esau*, *supra* note 12 at 807-08, 813-17; *Ewanchuk*, *supra* note 12 at 355-59.

[69] See text at *supra* notes 13-30.

[70] See *supra* notes 48-49, and consider the example of X's belief that "Y is Z" though X is aware of facts that are inconsistent with the proposition that "Y is Z." The problem is analogous to that in *Hodges's Case*, Liverpool Summ. Assizes, 1838, but here the question is whether the belief is "honest," *i.e.* neither reckless nor wilfully blind, not whether the accused is the perpetrator.

[71] See *Molis v. The Queen*, [1980] 2 S.C.R. 356 at 362 [*Molis*].

[72] At present, the *Criminal Code* offences affected by these exceptions include forcible entry, s. 72; theft, s. 322; property offences, ss. 430-46; and defence of property, ss. 38-42. All the exceptions are statutory and limited.

awareness of the *facts* that *the law, not the accused,* defines as material to "consent" pursuant to section 273.1.

The trial acquittal in *MacFie* provides clear evidence that the defence of "belief in consent" continues to cause error. There are other reasons to anticipate that the old assumptions may survive. For example, in *Ewanchuk*, Justice Major stated that "to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant *communicated consent to engage in the sexual activity in question*."[73] Standing alone, out of context, this statement appears to equate "belief in communicated consent" with "moral innocence." The common view is that conviction of the "morally innocent" is "abhorrent,"[74] the epitome of injustice. Resonance between the terms "innocent," "honest," and "excused" helps further to explain why the rhetorical impact of the term "honest belief" is so seductive, leading to conclusory reasoning, again and again, as the impulse to be "fair" overwhelms rationality. The exculpatory rhetorical power of the term is likely to continue to permit assailants to present themselves as possible "moral innocents" (implying that, if charged, they "should be" entitled to be acquitted) and cause the legal meaning of the term "honest belief" as clarified in *Esau* and *Ewanchuk* to be overlooked.[75] The effect will be to undermine effective enforcement of sexual assault laws, as it did in the past, by truncating analysis of *mens rea*. This is almost inevitable if the assertion of a credible "belief in consent"—which may be either a "sincere (albeit not necessarily validated) belief" or a "credible lie," continues to be widely accepted as a negation of recklessness and wilful blindness, rather than a red herring that invites verdicts based on conclusory reasoning.

Affirmative steps are therefore required to block the subversive rhetorical impact of the term "honest belief" in legal analysis. For here, the devil is precisely in the details. The legitimacy of this approach may be challenged, however, on the ground that an accused who holds an "honest belief" in consent is "innocent." In view of the controversy about these issues, Justice Major's comments about "moral innocence" and belief in consent and their import for proof of criminal responsibility merit close

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[73] *Ewanchuk, supra* note 12 at 354 [emphasis in original]. Confusion results when the phrases "moral innocence" and "mental innocence" are used loosely, as this remark in *Ewanchuk* arguably illustrates.

[74] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 513 [*Re B.C. Motor Vehicle*].

[75] If potential complainants also *assume* that "*any* belief in consent" either *is, or should be,* a good and sufficient defence, few sexual assaults will be reported. Anecdotal evidence suggests such assumptions are still common in Canadian communities. The old rhetoric arguably has a crucial role in perpetuating them.

examination. Do such comments suggest that twenty years of debate and reform have only brought Canadian common law interpretation of *mens rea* in sexual assault back to what many Canadians assumed it to be (incorrectly, I have argued) in the early 1980s? Is Canadian law condemned to be forever abjectly subject to a cultural bias that sees beliefs as conclusively exculpatory?[76] Is section 273.2 vulnerable to constitutional challenge under section 7 of the *Charter*? Should Canadian jurists therefore follow the English courts and reaffirm the exculpatory effect of a "genuine" mistake?[77] Or, on the other hand, is Canadian law pointing towards a resolution of these issues that merits consideration by other jurisdictions that seek to combine enforceability of the law with analysis of culpability grounded on subjective awareness?

VI. CULPABLE AWARENESS AND CRIMINAL RESPONSIBILITY

Why, we must therefore ask, should scrutiny of culpable awareness in sexual assault cases extend beyond the accused's belief in consent? Does this place the "innocent" at risk of conviction? To answer these questions we must re-examine the basis of criminal responsibility and attempt to clarify the relationship between "moral innocence" and criminal culpability in Canadian law.

In the last thirty years, Canadian judges have examined the prerequisites of conviction and restated the principles of penal liability in a series of cases.[78] The fundamental proposition in the theory of criminal responsibility that underlies Canadian criminal law is that each individual is a rational agent who acts voluntarily and has control over the actions he or she performs. In the absence of evidence to the contrary, the accused is assumed to act voluntarily and is ordinarily inferred to be aware of the facts material to the offence. Classification of offences as absolute, strict liability,

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[76] If that were the case, it would have sweeping implications, implications that are inconsistent with the law of *mens rea*, as the text below argues.

[77] See Michael Davies, "Lawmakers, Law Lords and Legal Fault: Two Tales from the (Thames) River Bank: *Sexual Offences Act 2003*; *R. v. G. and Another*" (2004) 68:2 J. Crim. L. 130-49; Kumaralingam Amirthalingam, "*Caldwell* Recklessness is Dead, Long Live *Mens Rea's* Fecklessness" (2004) 67 Mod. L. Rev. 491-500.

[78] The views and arguments presented in the text below are consistent with the principles affirmed in those cases, many of which encompassed challenges under section 7 of the *Charter*. Some of the leading cases are cited below. At points, I extrapolate beyond what is explicitly stated in the reasons for judgment, in order to identify and develop the underlying assumptions and elements in the form of a rudimentary "theory" of "culpability," which I then use to interpret and evaluate assertions about "moral innocence."

or *mens rea*[79] does not affect legal assumptions about the individual, but instead determines the legal prerequisites of conviction and punishment.[80]

In absolute liability offences, fault is inferred from voluntary commission of the prohibited act, no analysis of evidence of the accused's awareness of the facts and circumstances that could have a bearing on culpability or "fault" is permitted, and, because fault may not be disputed, imprisonment may not be used as a punishment following conviction.[81] In strict liability offences, by contrast, the accused is permitted to adduce evidence and argument to show that he or she exercised "due diligence" or "reasonable care," and thus was not "negligent." Because the accused is permitted to contest the inference of culpability or fault that flows from proof of commission of the act, imprisonment is a permissible punishment. The conduct of the reasonable person, an objective standard, is used to assess fault in strict liability offences. An accused's lack of awareness or misapprehension of a material fact only negatives the inference of fault if the mistake is "honest" and "reasonable," a mistake that a reasonable person could have made. In other words, to make a mistake that is not both "honest" and "reasonable" is itself blameworthy in a strict liability context. Most, but not all, strict liability offences are "public welfare" or regulatory offences.

The third category of offences, *mens rea* offences, includes criminal negligence and general and specific intent offences. These offences, like absolute and strict liability offences, are classified by reference to the standard used to assess fault and the grounds that may be raised to negative fault. In criminal negligence, *mens rea* or fault is inferred from the facts based on the standard of the reasonable person in the same circumstances, unless the accused lacks capacity:

> As is the case with crimes of subjective *mens rea*, the *mens rea* for objective foresight of risking harm is normally inferred from the facts. The standard is that of the reasonable person in the circumstances of the accused. If a person has committed a manifestly dangerous act, it is reasonable, absent indications to the contrary, to infer that he or she failed to direct his or her mind to the risk and the need to take care. However, the normal inference may be negated by evidence raising a reasonable doubt as to lack of capacity to appreciate the risk.
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> Thus, if a *prima facie* case for *actus reus* and *mens rea* are made out, it is necessary to ask a further question: did the accused possess the requisite capacity to appreciate the risk flowing from his conduct? If this further question is answered in the affirmative, the necessary moral fault is established and the accused is properly convicted. If not, the accused must be

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[79] *R. v. City of Sault St. Marie*, [1978] 2 S.C.R. 1299.

[80] *Ibid.*

[81] *Re B.C. Motor Vehicle*, *supra* note 74.

acquitted.[82]

Thus in criminal negligence, the accused who is capable of apprehending risk but does not choose to use that capacity is not "morally innocent." Accused who do not lack capacity are assumed to have the abilities of the "reasonable person in the circumstances of the accused." All capable accused are assessed by that uniform minimum objective standard. The obligation to conform to the standard is imposed equally by law on everyone who chooses to participate in the activity. Only the accused who is *incapable* of appreciating the risks created by his or her conduct is not blameworthy. In support of this proposition, Justice McLachlin, as she then was, cites and quotes (with added emphasis) H.L.A. Hart's statement that the need for inquiry about the accused's capacity "is dictated by the moral principle that no one should be punished *who could not help doing what he did.*"[83] The rest of us are held to a uniform legal minimum standard when we undertake potentially harmful activities.

In another essay, originally published in 1961, four years after that cited above, Hart concludes that the "subjective element" in negligence that is crucial for the judgment of blameworthiness is not "a blank mind," but rather "a failure to exercise the capacity to advert to, and think about and control, conduct and its risks."[84] Thus, Hart suggests that negligent individuals are blameworthy because they failed to do that which *they could have done*, not simply as a consequence of the bare fact that they failed to do it. I suggest that it follows that the individual who is convicted of criminal negligence is blameworthy and justly held culpable because he or she *chose not to avoid or exercise reasonable control over the risk even though s/he had the capacity to apprehend it and the opportunity to avoid it.*[85] The fact that the individual's conduct departs to a marked and substantial degree from the objective standard is the basis for finding that the conduct violates the standard of conduct imposed by law and constitutes the *actus reus* of the offence. The *subjective fault* element that renders the individual *morally culpable* and liable to conviction and punishment lies in the *individual's choice* to undertake the activity and perform it in a manner that violates the

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[82] *R. v. Creighton*, [1993] 3 S.C.R. 3 at 44, McLachlin J.

[83] *Ibid.* at 62-63 quoting H.L.A. Hart, "Legal Responsibility and Excuses," in *Punishment and Responsibility: Essays in the Philosophy of Law* (London: Oxford University Press, 1968) 35 at 39 [*Punishment and Responsibility*].

[84] H.L.A. Hart, "Negligence, *Mens Rea*, and Criminal Responsibility," reprinted in *Punishment and Responsibility*, *ibid.* at 157.

[85] Thus in *R. v. Tutton*, [1989] 1 S.C.R. 1392, the Court abandoned differential treatment of acts of omission and commission.

minimum legal standard. In the absence of evidence negativing capacity or excusing the accused on the ground of reasonable mistake of fact, it is inferred from the facts that the individual accused did make one or more choices which entail culpability.[86] As in strict liability offences, an accused's lack of awareness or misapprehension of a material fact does not negative the inference of culpability in criminal negligence, unless the mistake of fact is one that is "honest" and "reasonable," that is, a mistake that a reasonable person in the same circumstances (and thus with the same knowledge of the *facts* the accused is shown to have had) could have made, and which can be described as "unavoidable" in the sense that it was beyond the knowledge and control of the reasonable person.

By contrast, in general intent *mens rea* offences culpable awareness is assessed by a "subjective standard." As before, the accused is assumed to act voluntarily and, by inference, to be aware of the facts. An accused is therefore easily found to have acted with awareness of the actual or possible existence of the very facts and circumstances that are identified in law as circumstances in which the accused's act is prohibited, and thus to have made a culpable choice.[87] The fault element that renders the individual "morally culpable," and liable to conviction and punishment, is the choice to act with awareness of the material facts. However, because the standard is subjective, the accused may adduce evidence and present argument based on the whole of the evidence to challenge all assumptions and inferences about his or her awareness of the facts. If the accused, *for reasons not within his or her knowledge and control*, may have not been aware of facts that indicated the circumstances were ones in which the action in question is prohibited, the accused's choice to commit the prohibited action is not culpable. In particular, established doctrine holds that an accused charged with a subjective *mens rea* offence may dispute the inference of culpability by evidence that he or she made a mistake of *fact* (not law), even if it was an unreasonable mistake (not a mistake that a "reasonable" person would make) as long as the mistake was "honest." This rule is widely viewed as a definitive feature of subjective liability in criminal law. This, of course, appears to bring us full circle, but we are now in a

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[86] What those choices were need not be proven. It is entirely possible that an individual charged with criminal negligence made an affirmative choice to create a risk of harm and even did so with subjective foresight of the substantial certainty that another person would be gravely injured or killed. However, on a charge of criminal negligence or absolute liability, the accused's intention or subjective foresight are not relevant. The only issues that must be determined are those required by law for conviction of the offence as charged.

[87] The accused's awareness of circumstances in offences prohibiting the causation of harmful consequences is also inferred, but foresight of consequences is handled as seen above in criminal negligence. Here as there, culpability lies in the choice to commit the underlying act.

position to use the principles that govern culpability to clarify the implications of the doctrine that "honest unreasonable mistakes may excuse."

The standards of conduct imposed by law apply uniformly and equally to all persons. This is essential if law is to afford equal protection to everyone.[88] Even mistakes of fact and their effects are subject to legal criteria. These criteria specify that to have an exculpatory effect, a mistake of fact must be "honest" and not itself in violation of the legal standard applicable to the offence. Whether the legal standard is the objective standard of the reasonable person, as in criminal negligence, or the actual subjective awareness of the individual accused, as in general and specific intent offences, that standard applies to determine whether a particular mistake of fact *negates* or instead *substantiates* the inference of culpable awareness.

In criminal negligence, a mistake of fact must be "reasonable." The requirement that the mistake be "honest" is separate. Both requirements must be met. Neither the individual who claims to have made a mistake that is "reasonable" but not "honest," nor the individual who "honestly" makes an unreasonable mistake, has a mistake of fact defence that negatives the inference of culpability. Assume there are two accused, the first an honest dunce, the second a shrewd liar. Both claim to have made honest and reasonable mistakes of fact. If assessment by the objective standard shows the dunce's mistake to have been unreasonable, the mistake cannot negative culpability and is unavailable as a defence. In such a case, the accused's "honesty" is irrelevant to the outcome; it cannot alter the outcome of the case and need not be determined.

The shrewd liar is more of a challenge. In this hypothetical, the liar's alleged mistake is *prima facie* "reasonable." The accused liar may therefore rely on the mistake to negate the inference of culpability in negligence, unless his or her dishonesty is revealed through cross-examination or other inconsistencies in the evidence. This is not such a hopeless case for the prosecution as it might appear to be. The trier of fact will often be able, on the basis of the evidence as a whole, to determine that the liar was aware that the factual belief, though "reasonable," was, or might be, mistaken. In an actual case, much of evidence will have a bearing on *both* reasonableness *and* honesty. Evidence to suggest the liar was aware of facts that are inconsistent with the alleged mistake would tend to show both dishonesty and that a reasonable person in the circumstances of the accused—and thus *with the knowledge of the facts the accused had*—could

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[88] See Wilson J. on the "universality of rights" in *Perka v. The Queen*, [1984] 2 S.C.R. 232 at 270-71.

not have made the mistake in question. Accordingly, in practice, if the liar's mistake of fact does not negative the inference of culpability in negligence, it will most often not be on the ground of the accused's dishonesty, but rather on the ground that the accused made an avoidable *choice* and is therefore "morally culpable." The conclusion that the accused was "dishonest" then follows as well, but is redundant; the liar is already liable to be convicted on substantive grounds.[89]

These issues are discussed as they arise in the context of a general intent offence (sexual assault), in reasons (in dissent but not on this point) in *Esau* by Justice McLachlin, as she then was:

> The concepts of wilful blindness and honesty in relation to consent merit further comment. Canadian law does not, unlike most jurisdictions in the United States, require that the defendant in a sexual assault trial have acted reasonably. The issue of mistake as to consent must be assessed on the basis of the particular accused person before the court. If he is more obtuse than the reasonable man, he may raise this in support of his contention that he mistakenly thought the complainant was consenting. However, Canadian common law does impose two requirements. First, the defendant cannot have been wilfully blind or reckless. The term wilful blindness connotes a deliberate avoidance of the facts and circumstances. It is the legal equivalent of turning a blind eye, of not seeing or hearing what is there to hear or see. It is the making of an assumption that the complainant consents without determining whether, as a matter of fact, the complainant consents. Blindness as to the need to obtain consent can never be raised by an accused as a defence, since the need for consent is a legal requirement which the law presumes the defendant to know. On the facts, wilful blindness to conduct or language which might support an inference of non-consent is similarly of no avail. The person who is not wilfully blind is the person who is appropriately aware, not only of the need to obtain consent (which he is presumed to know), but of what the conduct and circumstances reveal to one who looks to see whether that consent was being given or withheld. Second, the requirement that the defendant's belief have been honest has a similar effect. The defendant is not allowed to deceive himself, or to sharply take advantage of a passive or unclear response. He must honestly believe that the complainant consented.[90]

Doctrine thus holds that an "unreasonable" mistake, as long as it is honest, negatives culpable awareness in a general intent offence. Although honesty may appear to be *the* crucial factor, I submit that in practice it is of limited analytic significance. Again, assume there are two accused, the first an honest dunce, the second a shrewd liar. Both claim to have made honest mistakes. If the evidence shows either the dunce's or the liar's mistake to have been knowing, or due to wilful blindness or recklessness, the mistake substantiates rather than negates culpability and

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[89] In both strict liability and criminal negligence, once an accused raises mistake of fact to challenge the inference of culpability, the mistake is subject to scrutiny. To have an exculpatory effect, the mistake must be a mistake that a reasonable person, *with the knowledge of the facts the accused had,* could make.

[90] *Supra* note 12 at 807-08.

is therefore unavailable as a defence, either in law or on the facts. In such a case, the accused's "honesty" is irrelevant to the outcome; it cannot alter the outcome of the case and need not be separately determined. In many such instances—those of *MacFie* and *Sansregret* are examples—the "honest belief" could either be said to be due to "wilful blindness" in relation to a material fact or to be based on a mistaken appreciation of the legal significance of facts of which the accused is well aware.

At this point readers likely recognize that "unreasonable mistakes," when they are actually relevant to a material issue, will often substantiate, rather than negate, the inference of culpable awareness in subjective *mens rea* offences, because the person who makes such a mistake will often also thereby violate the standard applicable to subjective *mens rea* offences. That standard requires that everyone exercise the capacities he or she has to apprehend facts and draw rational inferences from them. As always, evidence of incapacity requires acquittal. The rest of us are subject to uniform minimum legal standards. We are free to believe what we will, however "unreasonable" those beliefs may be, but, in the absence of incapacity, those beliefs are not necessarily exculpatory.[91] Each mistake will substantiate, negate, or be irrelevant to the rebuttable inference of culpable awareness made whenever an accused commits an act prohibited by law. The legal effect of an alleged mistake depends entirely on the material facts and circumstances of which the accused was aware. It is therefore irrational to conclude that a mistake negates culpable awareness without examining the accused's actual awareness of the material facts and circumstances. A mistaken belief is no guarantee of "moral innocence."

VII. CULPABLE AWARENESS, CRIMINAL RESPONSIBILITY, AND SEXUAL ASSAULT

We are now in a position to examine the relationship between "honest belief," culpable awareness, and "moral innocence" in the context of sexual assault. In the absence of evidence to the contrary, individuals are assumed to be rational, to act voluntarily, and to choose what they will and will not do. These assumptions form the foundation for the principles of criminal justice used to hold individuals responsible when their actions violate the criminal law. An accused who would avoid "culpability" and claim "moral innocence" in relation to a general intent *mens rea* offence must act like the rational agent the law assumes him or her to be, and utilize his or her abilities of perception and reason when choosing what to

[91] Evidence to permit assessment of cognitive function may be required when a capable accused claims to be "obtuse."

do and not do. In the absence of incapacity, the only mistakes that are exculpatory are those that could be made by *a rational agent who was actually using his or her powers of perception and reasoning as required by law.* In the absence of evidence about the actual perceptual abilities and reasoning processes of the individual accused, inferences are made based on assumptions about the abilities of the rational person. If there is evidence that explains how an alleged mistake may have occurred, the trier of fact will consider whether the accused was aware of the possibility of error. If error could not have been anticipated or avoided, the accused is "morally innocent" and not "culpable." If the accused acted with awareness that error was possible, he or she possesses the minimum level of culpable awareness required for conviction. In these circumstances, the choice to commit the prohibited action entails moral culpability because the accused was aware that error was possible and could have chosen not to act.

The law of *mens rea* thus requires full, not merely partial, scrutiny of culpable awareness. Without a full analysis of *mens rea*, including an examination of the material facts and circumstances of which the accused was aware, it is impossible to determine whether an accused's "belief" in consent was reckless or wilfully blind. Constitutional guarantees for the liberty, personal security, and equality rights of all persons require that the law be enforced, not discounted or avoided. A competent accused is ordinarily aware of the facts material to the offence. In the absence of evidence of mistake of fact, failure by an accused to direct his or her attention to the significance of known facts for the existence of exculpatory and inculpatory material circumstances indicates, at best, indifference to those circumstances and is not an excuse.[92] Failure by an accused to appreciate the legal significance of known facts is a mistake of law, not an excuse.[93] This is a straightforward application of the principles of criminal responsibility.

It is therefore an error of law to conclude that if an accused either did believe or may have believed that the other party "consented," an acquittal necessarily follows. Instead, as we have seen, general principles require an examination of culpable awareness to determine whether, in the whole of the circumstances, an accused's choice to rely on belief in consent was culpable. This does not invoke duties of care beyond those already entailed by general legal principles and pertains in full to the law of sexual assault, before and after the 1992 amendments to the *Criminal Code*. It is

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[92] *Esau*, *supra* note 12 at 807-08, quoted with approval in *Davis*, *supra* note 26, by Lamer C.J. at 800-01. See also Kenny, *supra* notes 45, 48.

[93] *Ewanchuk*, *supra* note 12 at 356-57, Major J. See also *Molis*, *supra* note 71; *R. v. Forster*, [1992] 1 S.C.R. 339; *R. v. Jorgenson*, [1995] 4 S.C.R. 55.

therefore apparent that attitudes and assumptions, not the law, have long been the principal impediments to effective enforcement of the sexual assault laws.

Sexual assault laws could be drafted to limit liability to conviction to accused who act with positive knowledge of the absence of consent, and thus with a *mens rea* of intention.[94] They are not. Knowledge that consent is absent is one type of "culpable awareness," but sexual assault is an offence of "general intent." Sexual activity undertaken with recklessness or wilful blindness towards the absence of consent renders an accused equally liable to conviction on the ground that the accused, a self-aware rational agent, chose to act without knowledge of valid consent, voluntarily communicated. To conclude, without thorough analysis of the accused's subjective awareness, that the credible assertion of a "belief in consent" precludes a finding that the accused was reckless or wilfully blind, is to jump to conclusions and err in law. The law requires that awareness of material facts "trumps" self-serving beliefs. Were this not so, laws would be unenforceable. To fail to consider the legal significance of an accused's awareness of the material facts is to abandon the interests protected by sexual assault law without justification.

This view of the law represents no change whatsoever in the law itself. It may require a fundamental shift in widely held attitudes and assumptions about the practical implications of criminal law, in general, and sexual assault laws, in particular. Proper interpretation and application of the law of *mens rea* shifts the focus of attention from what an accused may have believed to the facts of which the accused was aware. Awareness of facts determines whether the choice is culpable. As a matter of law, an accused is deemed to appreciate the legal significance of facts and circumstances of which he or she is aware. If the accused was aware of one or more facts that, in law, signify that consent was or might have been absent, not voluntary, or not capable, the accused is liable to be convicted. Mistake of fact is then irrelevant to the outcome and the defence of belief in consent is unavailable. When a mistake defence is available on the evidence, a properly instructed trier of fact, deliberating reasonably, will consider whether the facts and circumstances of which the accused was aware included factors that are enumerated in section 273.1(2) or are grounds at common law to infer that consent might be absent, or not voluntary, or that the complainant might lack capacity to consent, as these issues are defined in law. In either case, awareness of such facts renders the accused liable to conviction, despite any "belief in consent," and no matter

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[94] See, for example, the wording used in s. 181 of the *Criminal Code*, *supra* note 1, prohibiting the "wilful" publication of news that the accused "knows is false."

how "sincere," "genuine," or "honest," the belief may have been in the lay sense of these terms.[95]

This approach is fully consistent with established principles of criminal responsibility. Where there is latitude for conscious choice, it is not unjust to hold an agent accountable for his or her choice. There is no question that when harm is caused by the act of an accused, who made a deliberate choice to exercise power with awareness that he or she was only partially informed about the material circumstances, the accused is "morally culpable." Liability is based on the accused's subjective awareness, not imposed by reference to a modified subjective, subjective-objective, or objective standard. It is the case that the means to acquire knowledge and validate beliefs about circumstances are not always fully within an individual's control. When action was necessary and delay impossible, an accused may even be excused for acts committed with awareness of his or her ignorance of relevant facts. In the context of sexual assault, such exculpatory grounds are unavailable, however, because the crucial decision—to take action in reliance on the belief or knowledge one has—is avoidable and undeniably a matter of individual choice.[96] But for the decision to pursue the sexual activity without knowledge that voluntary agreement has been communicated by a person with legal capacity, the accused would not be liable to conviction. The deliberate decision to act with awareness that one lacks such knowledge demonstrates indifference or callous disregard for the interests of the other person and contempt for the law.[97]

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[95] Not at common law in England, however, see *supra* note 77.

[96] Even for the capable obtuse accused who is aware that he or she is obtuse.

[97] The significance of the distinction between knowledge and belief for the analysis of subjective fault lies precisely in our subjective experience of the difference. Accordingly, a fully developed theory of criminal responsibility must take *conscious self-awareness* or *reflexivity* into account. Canadian jurisprudence grounds culpability and liability to conviction on control and choice. Jurists in Canada need to revisit doctrinal issues within a framework built on those fundamentals and clarify the terminology used to describe and differentiate the various types of *culpability used to justify liability to conviction and punishment.* The analytical significance of the "choices" made by those accused viewed as "cognitive agents," persons with capacity to perceive, believe, and know, should be re-evaluated. See also McIntyre, *supra* note 45 and Kenny, *supra* notes 45, 48. Kenny further suggests at 62 that:

> [W]hether the belief was reasonable is not simply ... evidence ... that the belief was actually held: even if the belief was honestly held, its unreasonableness may be evidence of that indifference to the woman's consent which is sufficient for *mens rea*. Thus ... the issue of the reasonableness of the accused's belief can be raised without there being any question of "finding an intent where none existed" (*ibid.* at 62).

Thus in Kenny's view, reference to "unreasonableness" does not invariably involve use of an objective standard to "input" intent. Here, he uses the term "unreasonable" to describe a culpable

"Moral culpability" in sexual assault therefore lies in the deliberate choice to engage in sexual activity with subjective awareness of one or more facts that are rationally inconsistent with the voluntary communication by the other person of valid capable consent, as defined in section 273.1 and the common law, to engage in the activity in question. "Moral innocence" requires that the accused be aware of facts that are rationally consistent with voluntary communication of consent to engage in the activity in question by a person who is legally capable of consent, as defined in section 273.1 and the common law, and rationally inconsistent with any other description of the circumstances. It is therefore clear, I suggest, that Justice Major's statement in *Ewanchuk*—"to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant *communicated consent to engage in the sexual activity in question*"[98]—is an incomplete and, to that extent, incorrect statement of the law. Standing alone, out of context, this statement equates "belief in consent" with "moral innocence." This misrepresents the law and cannot be what Justice Major intended to convey. The statement should instead be read in the context of the reasons and the law as a whole. Had *Pappajohn* received such a reading thirty-five years ago, much confusion and consternation could have been avoided. History need not repeat itself.

VIII. OBJECTIVE OR SUBJECTIVE?

Application of section 273.2(b) to preclude reliance on the defence of mistaken belief in consent, without consideration by the trier of fact as to whether the defence is precluded under section 273.2 (a)(ii) (as it would be in all conceivable cases in which it might be barred under section 273.2(b)), might be taken to show that fault in sexual assault may be established *either* by proof of *mens rea* in the form of subjective awareness *or* deviation from an "objective" standard, and further, that section 273.2(b) is used precisely when an inference of recklessness or wilful blindness cannot be made under section 273.2(a)(ii). Neither assumption is correct. Section 273.2(b) does not provide an objective test based on the reasonable person but instead mandates an examination *of the facts of which the individual accused was aware* and provides that that examination take the form of application of a formula or test for wilful blindness that the lay trier of fact will find easy to understand and apply. Section 273.2, as a whole, is

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choice to disregard the significance of those facts of which one is aware, as well as those one could ascertain.

[98] *Supra* note 12 at 354 (emphasis in original).

thus comparable to section 265(4) in that it codifies, and thereby mandates, instructions to be followed by the trial judge and the trier of fact, respectively, when determining whether the defence of belief in consent is available, in law and on the facts. This view is supported by Justice Morden's conclusion in *Darrach* that under section 273.2(b) "[t]he subjective *mens rea* component of the offence remains largely intact."[99] That is the final word on the issue in *Darrach.* The constitutionality of section 273.2(b) was not at issue in *Darrach*'s further appeal to the Supreme Court of Canada. There the constitutional challenge was to the rape shield provisions—ss. 276(1), 276.1(2)(a), 276.2(2), and 276.2(c).

Approaching the debate from another angle, I suggest that adoption of an "objective" standard to assess culpability would invite dispositions that reflect community prejudices and practices. To use the very social norms of sexual conduct that result in the commission of sexual offences to determine whether an exculpatory defence is available, would, in the vast majority of cases, only serve to approve those norms and the conduct based on them. That approach would permit the *effective* legal norm to be determined by reference to the "ordinary" conduct of the "ordinarily" sexually aggressive individual, rather than by a positive standard pursuant to the rule of law. That approach would also conflict with the political and constitutional values with reference to which Canadian sexual assault legislation is framed. Canadian law defines sexual assault primarily by reference to consent and equal rights of individual autonomy and self-determination; it does not make community opinions about the propriety of an accused's conduct or the quantum of force used indicia of whether there was consent.[100] Those who believe that use of objective standards, standards based on custom and community attitudes, to assess culpability in sexual assault cases can result in an interpretation of the law that is both effective and consistent with the objectives of the legislation may need to reflect further about the nature and function of objective standards—what they are, how they operate, and what they achieve. In Canada, those remain speculative questions; negligent sexual assault is not an offence.

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[99] *R. v. Darrach* (1998), 122 C.C.C. (3d) 225 at 252 (Ont. C.A.) following McLachlin J., as she then was, dissenting (but not on this point) in *Esau, supra* note 12 at 813-14 (see *supra* note 65 and accompanying text).

[100] The use of policy grounds to vitiate consent when an accused intends grievous bodily harm, as in *R. v. Welch* (1995), 25 O.R. (3d) 665 (C.A.), only confirms that the absence of consent or "voluntary agreement," not violence, is the definitive element.

IX. CONCLUSION

Exculpatory rhetoric and extra-legal beliefs about sexuality have distorted the operation of the defence of "honest belief in consent" and subverted application and enforcement of the sexual assault laws for decades. Old rhetoric can easily perpetuate old attitudes and assumptions that are inconsistent with Canadian law. The old familiar patterns are likely to continue, however, despite clarification of the law, unless decision makers in the criminal justice system break away from that old rhetoric and the self-contradictory doctrinal assumptions linked with it, and take a fresh approach to the analysis of culpability in sexual assault. We must abandon the working assumption that proof of culpability turns on the credibility of the accused's "honest belief" in consent and focus instead on analysis of the significance of the accused's awareness of facts material to consent as defined in section 273.1.

I recognize, however, that assumptions embedded in a culture and sustained by rhetoric are not easily set aside. I also recognize that a solution proposed in general terms is an insufficient response to the subtle and profoundly insidious and subversive influence that cultural beliefs inconsistent with law continue to exercise on all decision makers, from complainants to judges. Such a proposal is especially insufficient and unsatisfying in an article that purports to demonstrate that it is precisely in the *practical application* of the law that errors are perpetuated. Therefore, in a subsequent article,[101] I examine the practical issues that arise in implementing the shift in analytic focus proposed here. That article discusses the implications of that shift for decisions about the availability of the defence of belief in consent pursuant to section 265(4). The objectives are: (1) to maximize clarity in delineating the legal issues to be decided; and (2) to curtail reliance on beliefs based on myth, stereotype, and the other extra-legal assumptions that distort analysis and subvert the application and enforcement of legal norms in sexual assault cases. Model jury instructions based on the analysis in these two articles are proposed in a third article.[102]

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[101] "Sexual Assault: Availability of the Defence of Belief in Consent" (2005) 84 Can. Bar. Rev. [forthcoming].

[102] Lucinda Vandervort, "The Defence of Belief in Consent: Guidelines and Jury Instructions for Application of *Criminal Code* Section 265(4)" 50 Crim. L.Q. [forthcoming in 2005].