

## Mistake of Law and Sexual Assault: Consent and Mens Rea

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*Prenant la législation en matière d'agression sexuelle et la défense d'erreur de fait sur la réalité du consentement de la victime comme objets d'analyse, Lucinda Vandervort remet radicalement en question la construction sociale et légale du consentement. Elle soutient, qu'au sens le plus élémentaire, l'agression sexuelle est un assault. Aussi doit-il être défini comme tout attouchement à caractère sexuel sans le consentement réel de la personne concernée. Elle allègue qu'en autorisant un accusé à utiliser la défense d'erreur de fait quant au consentement de la victime, les juges permettent que les mythes sociaux sur les goûts sexuels des femmes soient assimilés de manière tout à fait impropre à une preuve de consentement. L'auteure rejette tant le droit positif qu'une approche de responsabilité stricte pour redéfinir le droit du consentement. Elle propose plutôt que celui-ci fasse l'objet d'une preuve positive. C'est à cette condition seulement, selon elle, que les définitions sociales du "consensualisme sexuel" en viendront graduellement à reconnaître l'autonomie physique des femmes et leur libre arbitre en matière sexuelle.*

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*Using the law of sexual assault and "mistaken belief in consent" as the subject matter of her analysis, Lucinda Vandervort radically challenges the social and legal construction of the concept of "consent." She argues that at the most basic level, sexual assault is assault. Thus it should be defined in law as any sexual touching of another without actual consent. She argues that when judges allow accuseds to use the defense of mistaken belief in consent, they are actually permitting social myths about women's sexual tastes to be treated quite improperly as evidence of consent. The author rejects both the present law and a strict liability approach to redefining the law of consent. Instead, she proposes that the element of consent be subject to positive and affirmative proof. Only if the law requires actual affirmative consent will social definitions of "consensual sex" gradually come to recognize women's physical autonomy and sexual self-determination.*

### Introduction

Study of the Canadian and Anglo-American case law reveals that mistake of law has not been seen to be an issue of central importance in rape and sexual assault cases.<sup>1</sup> That is hardly surprising, for aside from cases of mistake involving minors, all culpability questions which are problematic in rape and sexual assault cases arise in relation to the matter of consent.<sup>2</sup> And the mistaken belief of an accused that a sexual transaction was consensual is typically characterized as a mistake of fact, not of law, and is used to ground a defence of lack of *mens rea*.<sup>3</sup> Although there now exists an extensive body of

The footnotes are part of the article and should be read along with the text. The law is discussed as at August 1986.

1. This statement appears to reflect the Australian and New Zealand positions accurately as well. In all of these jurisdictions the mistake of law issue is specifically identified as relevant in rape and sexual assault cases only when the defendant attempts to rely on ignorance of a statutory bar, such as a statutory minimum age of consent to sexual activity, or on customary aboriginal cultural and social practices that are different from those permitted under colonial and post-colonial laws. The general practice in all of these jurisdictions has been to disallow a *mens rea* defence in such circumstances, although the belief of the defendant is often taken into consideration at sentencing. An alternative solution lies in the recognition of self-government for distinct cultural groups; see also note 7. But international human rights protocols arguably set minimum standards which, if they are observed, may eliminate certain customary practices.
2. M. R. Goode, "Mens Rea in Corpore Reo: An Exploration of the Rapists' Charter," *Dalhousie Law Journal* 7 (1983): 447, 453.
3. The following hypothetical trial excerpt is designed to illustrate the difficulties faced in evaluating a typical defence of honest but mistaken belief in a sexual assault case:

The defendant, Robert Ross-Bertrand, is a typical Canadian male. He is twenty-two years of age and employed as a managerial assistant in a branch of a major Canadian bank. He has no criminal record aside from one impaired driving conviction. He is bilingual and grew up in Winnipeg. His family background is respectable middle-class. His mother is active in local community service organizations and his father is a political appointee to a federal regulatory board.

The complainant is an unmarried twenty-year-old student with one child. She is an immigrant. Her parents are political refugees who have ten children other than the complainant and work as cleaners in the Federal Building in Winnipeg. She has no criminal record, but has been a welfare recipient off and on for the last two years. At trial she refused to be sworn in as a witness and instead affirmed the truth of her testimony.

Defence Counsel:

Q. Mr. Ross, the complainant has stated that she believes you may have thought she was consenting to have sex with you.

A. That's correct sir. I certainly did believe that.

Q. Mr. Ross, could you please tell the court what happened that gave you reason to believe that.

A. Well, sir, as she told you, after we left the bar we went over to the house of friends of mine, but they weren't home so we went over to my place.

Q. What time was it and why did you go there?

A. Oh, it was about 7 p.m. We had been at the bar since 6 and we were both hungry and so we went to my place for supper.

Q. Oh I see, then what happened?

A. Well, we made supper and I fooled around with her a bit while we were doing that and then we ate.

Q. What do you mean you fooled around?

A. Oh, I kissed her and stuff.

Q. And stuff?

A. Well, I touched her up and down on her back when I was kissing her.

Q. What happened when you finished eating?

A. She said she had to leave, that she had a lot of things to do that night. But I thought I could get her to change her mind.

Q. So what did you do?

A. I said: "Wait a few minutes, you've got to see this new video I just got." She said she really had to leave, but she'd stay just ten minutes more. So we went in the living room and sat on the couch to watch it and after a couple of minutes I put my arms around her and started kissing her.

Q. What did she do?

A. Oh, she struggled and tried to push me away; she said she really had to go now and to stop.

Q. Did you stop?

A. Oh, no, sir, I could tell she didn't mean it.

Q. She didn't mean it?

A. Oh, no. Girls never mean it when they say *no*. They just say that because they're supposed to. My mother was the same way. She would just say *no*; but then she'd never do anything about it.

Q. Excuse me, Mr. Ross, but are you saying you've had sex with your mother on a number of occasions?

A. Oh God no, sir. I just mean you don't need to pay that much attention to what women say because they never seem to stick with it.

Q. How long had you known the complainant?

A. Two hours.

Q. But you knew she was like you say your mother was?

A. She's just a woman, sir, and anyway I could tell she really wanted to have sex with me, they all do, it's just they are brought up to pretend they don't like sex. I didn't rough her up anymore than I usually do. I never got charged with sexual assault before. I didn't do anything wrong. I didn't hurt her or anything. I know she's lying, sir. If she hadn't really wanted to have sex with me, she would have gotten hysterical and started screaming and crying. She didn't, she just kept arguing with me and telling how stupid I was being, and that she didn't want to have anything more to do with me.

Q. But you didn't believe that?

A. No, sir, would you? I mean, really sir, would you? I mean this chick I hardly know comes to my house. It's night time. She eats my food. She lets me kiss her. She doesn't flip out when I go after her. I jerk her jeans down to her knees and she doesn't yell, she just keeps pushing me away. It's *obvious* she wanted sex. Anyway, if she hadn't, she would have never come home with me from the bar. Any girl would have known that was an invite.

Q. An invite?

A. Yes, you go to a guy's house at night of your own free will from a bar where he picked you up and it's like announcing to the world you want sex with him. *Any* fool knows that...sorry sir, nothing personal.

Q. So you were in the living room and you pulled her jeans down?

A. Yes.

Q. Did she ask you to?

A. No sir, not really.

Q. Then why did you do it?

A. Well, I could tell she wanted me to.

Q. How's that Mr. Ross?

A. Well, I could just tell.

Q. How Mr. Ross?

A. Well sir, have you ever tried to have sex with a woman wearing jeans? Like it was the next thing, and like I said before, I could tell she really wanted it, otherwise she wouldn't have been there at all.

Q. So then what happened?

A. Well she couldn't move around too good with jeans down around her knees, so I laid her out on the couch.

Q. Did she ask you to?

A. No, sir.

Q. Then what happened?

A. Well she couldn't kick me anymore cause of the jeans, and she couldn't get up, so I started rubbing her genitals and pretty soon she got wet, so I asked her if she was ready and shoved my penis inside.

Q. Well, how could you do that so easily?

A. Well, her feet were trapped in the jeans and she couldn't fight me off.

Q. Now, Mr. Ross, did she ask you to do any of that?

A. Not in so many words, sir, but like I say I could tell she wanted me to.

Q. What did she do after you put her on the couch, Mr. Ross?

A. She said I might as well stop because she didn't want sex.

Q. Then what did she do?

A. Oh she stared at the ceiling and drummed her fingers on the wall and acted really bored

scholarly writing that describes, analyses, and supports or objects, on a variety of theoretical and political grounds, to continued use of this particular defence in an unqualified form in sexual assault cases,<sup>4</sup> invariably the mistake is also

and fed up, like she was pretending I was just a pain in the ass.

Q. How long did that last?

A. The whole time, sir.

Q. What whole time?

A. While I was rubbing her and me and then even after she got wet.

Q. What did she say when you asked if she was ready?

A. Nothing sir, and anyways I was in a hurry.

Q. So you did not wait for an answer?

A. No sir, I could tell she wanted me to go ahead. I mean she was obviously ready for it.

Q. What do you mean? I thought you said she was acting like you were a pain in the ass?

A. Yes sir, that's what she was pretending, but she got so wet I could tell that the way she was acting was all just play-acting and really she was just lying there wanting me to do it.

Q. Mr. Ross, if someone rubbed your genitals would you get an erection?

A. Yes sir, right away sir.

Q. Have you ever had someone rub your genitals when you didn't want to have sex with them?

A. No, sir.

Q. So you don't know whether you would still experience a physical reaction or not, Mr. Ross?

A. No, I guess not, sir.

Q. Have you ever discussed genital lubrication with a woman?

A. No, sir.

Q. Then what is the source of information on which you relied to infer that because the complainant had wet genitals she wanted sex with you?

A. All the women I've ever known who had wet genitals had sex with me. And, like I said, I've never been called a rapist before.

Q. Have you ever studied logic, Mr. Ross?

A. No, sir. I don't think most people have, sir.

Under the approach to analysis of section 244 used in processing sexual assault cases at present, a case of this type would probably be screened out as "unfounded" by the police or rejected for prosecution by the Crown on the grounds that the mistaken belief in consent was not *sufficiently* unreasonable, nor the accused sufficiently disreputable, for there to be a real chance of conviction. In the unlikely event that it proceeded to trial, Mr. Ross would be fully represented by private counsel, who, in the whole of the circumstances, would not engage in plea bargaining. The result at trial probably would be a finding of not guilty on the ground that Mr. Ross believed the complainant was consenting. Although this belief was mistaken it appears to have been honestly held. The complainant has testified that she believes the accused may have believed that she was "consenting." The accused may be found to lack intelligence and "social polish," but he will probably be believed. Any inference of intent, recklessness, or wilful blindness on the consent issue thus appears to be negated. Mr. Ross *did* advert to the issue of consent and concluded that there was consent. In doing so he did not avoid awareness of any facts. He was fully aware of what the complainant was doing and found *nothing* in her behavior as he interpreted it that was inconsistent with "consent" as he understands it.

This article provides a new and alternate paradigm for analysis of Mr. Ross's state of mind. The reader may find it useful to refer back to this fact situation as an aid to understanding how and why the approach to analysis of section 244 developed in this article can dramatically alter enforcement of the sexual assault provisions. This hypothetical and other examples drawn from fact situations considered by the courts are discussed below in the text and notes. The approach proposed in this article would result in both the elimination of a lack of *mens rea* defence based on a mistaken belief in consent in some cases in which that defence is now allowed, and the laying of charges of sexual assault in many cases now screened out by the police as "unfounded" or rejected for prosecution by the Crown on the ground that conviction is unlikely. The fact situations considered in the past by trial and appellate judges are obviously representative only of the first category of cases that would be affected by the paradigm proposed here, *and not of the second category of cases*. Judges never deal with fact situations that are not selected for prosecution.

4. Peter Alldridge, "Mistake in Criminal Law Subjectivism Reasserted in the Court of Appeal," *Northern Ireland Legal Quarterly* 35 (1984): 263; M. Baril, M. M. Cousineau, and S. Gravel, "Quand les Femmes sont Victimes... Quand les Hommes Appliquent la Loi," *Criminologie* 16 (1983): 89; Sue Bessmer, *The Laws of Rape*, Landmark Dissertations in

Women's Studies Series, ed. Annette K. Baxter (New York: Praeger, 1984); Leigh Bienen, "Mistakes," *Philosophy and Public Affairs* 7 (1978): 224; Christine Boyle, Marie-Andrée Bertrand, Céline Lacerte-Lamontagne, and Rebecca Shamai, *A Feminist Review of Criminal Law* (Ottawa: Minister of Supply and Services Canada, 1985); Christine Boyle, "Married Women — Beyond the Pale of the Law of Rape," *The Windsor Yearbook of Access to Justice* 1 (1981): 192; Christine Boyle, *Sexual Assault* (Toronto: Carswell Company Ltd., 1984); Christine Boyle, "Sexual Assault and the Feminist Judge," *Canadian Journal of Women and the Law* 1 (1985): 93; Ann Burgess, *Rape and Sexual Assault* (New York: Garland Press, 1985); Lorene Clark, "Politics and Law: The Theory and Practice of the Ideology of Male Supremacy," in *Law and Policy*, ed. D. N. Weisstub, Osgoode Hall Annual Lecture Series (Toronto: Osgoode Hall Law School, York University, 1976) 35; Lorene Clark and Debra Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Women's Press, 1977); David Cowley, "Recklessness in Rape," *Journal Criminal Law* 48 (1984): 348; D. Cowley, "Retreat from Morgan," *Criminal Law Review* (1982): 198; Ian Cunliffe, "Consent and Sexual Offences Law Reform in New South Wales," *Criminal Law Journal* 8 (1984): 271; Victoria J. Dettmar, "Culpable Mistakes in Rape: Eliminating the Defense of Unreasonable Mistake of Fact as to Victim Consent," *Dickenson Law Review* 89 (1985): 473; Peter W. Ferguson, "Reasonable Belief in Rape and Assault," *Journal Criminal Law* 49 (1985): 156; M. R. Goode, "Mens Rea in Corpore Reo," M. R. Goode, "The Mental Element of Rape, the Naffin Report and Other Questions: A Defence of the Common Law," *Criminal Law Journal* 9 (1985): 17; R. O. Greener, "Consent-Recklessness-Genuine though Mistaken Belief a Defence-Direction to Jury-Sexual Offences (Amendment) Act 1976, s. 1(1)(2)," *Criminal Law Review* (1985): 236; John D. Harmen, "Consent, Harm, and Marital Rape," *Journal of Family Law* 22(3) (1983-84): 423; Lucy Reed Harris, "Towards A Consent Standard in the Law of Rape," *University of Chicago Law Review* 43 (1976): 613; Graham Hughes, "Consent in Sexual Offences," *Modern Law Review* 25 (1962): 672; Alan C. Hutchinson, "Rape and Sexual Assault," *New Law Journal* 133 (1983): 1078; Kathleen A. Lahey, *Implications of Feminist Theory for the Direction of Reform of the Criminal Code* (Ottawa: The Law Reform Commission of Canada, 1984); Catharine A. MacKinnon, "Feminism, Marxism, Method, and The State: An Agenda for Theory," *Signs: Journal of Women in Culture and Society* 7(3) (1982): 515; Catharine A. MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," *Signs: Journal of Women in Culture and Society* 8(4) (1983): 635; Catharine A. MacKinnon, "Toward a Feminist Jurisprudence," *Stanford Law Review* 34 (1982): 703; Jeanne C. Marsh, Alison Geist, and Nathan Caplan, *Rape and the Limits of Law Reform* (Boston, Mass.: Auburn House Publishing Co., 1982); Frances Olsen, "Statutory Rape: A Feminist Critique of Rights Analysis," *Texas Law Review* 63 (1984): 387; Judith A. Osborne, "Rape Law Reform: The New Cosmetic for Canadian Women," *Women and Politics* 4 (1984): 49; Graham Parker, "The Legal Regulation of Sexual Activity and the Protection of Females," *Osgoode Hall Law Journal* 21 (1983): 187; Graham Parker, "The 'New' Sexual Offences," C.R. (3d) 31 (1983): 317; Toni Pickard, "Culpable Mistakes and Rape: Relating Mens Rea to the Crime," *University of Toronto Law Journal* 30 (1980): 75; Toni Pickard, "Culpable Mistakes and Rape: Harsh Words on Pappajohn," *University of Toronto Law Journal* 30 (1980): 415; Patricia A. Resnick, "The Trauma of Rape and the Criminal Justice System," *The Justice System Journal* 9 (1984): 52; Diana Russell, *Sexual Exploitation* (Beverly Hills, California: Sage Publications, 1984); P. A. Sallman and Duncan Chappell, *Rape Law Reform in South Australia: A Study of the Background to the Reforms of 1975 and 1976 and of their Subsequent Impact* (Adelaide: University of Adelaide, 1982); Claudine Schweber and Clarice Feinman, *Criminal Justice Politics and Women — The Aftermath of Legally Mandated Change* (New York: Haworth Press, 1985); Jocelyne A. Scutt, "Consent Versus Submission: Threats and the Element of Fear in Rape," *University of Western Australian Law Review* 13 (1977): 52; Jocelyne A. Scutt, "Fraudulent Impersonation and Consent in Rape," *University of Queensland Law Journal* 9 (1975): 59; Shaun Spencer, "Assault with Intent to Rape — Dead or Alive?," *Criminal Law Review* (1986): 110; Donald Stuart, "Pappajohn: Safeguarding Fundamental Principles," *McGill Law Journal* 26 (1981): 348; Charles A. Sweeney, "Crim. Law-Rape, etc.," *Australian Law Journal* 59 (1985): 112; Christina M. Tchen, "Rape Reform and a Statutory Consent Defence," *Journal of Criminal Law and Criminology* 74 (1983): 1518; Kate Warner, "The Mental Element and Consent Under the New 'Rape' Laws (Australia)," *Criminal Law Journal* 7 (1983): 245; Robin D. Weiner, "Shifting the Communication Burden: A Meaningful Consent Standard in Rape," *Harvard Women's Law Journal* 6 (1983): 143; Celia Wells, "Comment: Law Reform, Rape and Ideology," *Journal of Law and Society* 12 (1985): 63; John M. Williams, "Mistake of Fact: The Legacy of Pappajohn v. The Queen," *Canadian Bar Review* 63 (1985): 597; Jennifer Wriggins, "Rape, Racism and the Law," *Harvard Women's Law Journal* 6 (1983): 103.

analysed by these writers as a mistake of fact, not as a mistake of law.<sup>5</sup> Scholars, practitioners, and judges thus *all* appear to be in full agreement in this matter. No dissenting voice or view has been expressed.

This article rejects that analysis. The thesis of this article is that many so-called mistakes of "fact," relied on by sexual assailants to raise a reasonable doubt whether they had the *mens rea*, or aware state of mind required for conviction, are actually mistakes of "law" that have been misclassified. *But for such misclassification, the "mistake" would provide no defence.*

Mistake of law is not a defence in Canadian criminal law because the common law principle that ignorance of the law is not an excuse for commission of an offence is codified in section 19 of the Criminal Code.<sup>6</sup> Knowledge of the

5. A mistake about what the statutory age of consent is is a mistake of law, but because it provides no defence whatsoever, it is not relied on by an accused. A mistaken belief that a sexual partner was as old, or older than, the age known by the accused to be specified by law as the age of consent, and thus old enough, in fact, to give a legally effective consent, is analysed as a mistake of fact. But if consent by a person of the victim's actual age and sex is irrelevant in law, the mistake of fact about the victim's age provides no defence. For an example of a provision of the latter type, see section 140 of the Criminal Code, R.S.C., 1970, as amended, which provides that consent by a person under fourteen years of age is not a defence to the offence of sexual intercourse with a person under fourteen years of age. Let there be any doubt as to legislative intent with respect to mistakes about a victim's age, it is removed by section 146(1), which provides that the defendant's belief about the actual age of the victim is not an element of the offence; such a belief is therefore irrelevant for liability. But see *R. v. Roche* (1985), 46 C.R. (3d) 160 (Ont. C.A.). For further discussion of these issues as they relate to statutory age of consent provisions in particular, see Boyle, *Sexual Assault*, 102, and the annotation by Donald Stuart on *R. v. Roche*.
6. In Canada all defences are based either on a statutory provision in the Criminal Code or on common law defences. Section 7(3) of the Criminal Code preserves all common law defences *except to the extent that they are inconsistent with statute law*. I argue that the terms used in section 19 must be interpreted in a manner that permits section 19 to have an effect, rather than no effect, and therefore that the effect of section 19, which bars reliance on ignorance of the law as an excuse, must be to eliminate the availability of ignorance of the law and mistake of law as a common law defence. In doing so I am well aware that some commentators on English and Canadian criminal law assert or imply that this is not the case. Writing about English criminal law, Glanville Williams, *Textbook of Criminal Law* (London: Stevens & Sons, 1979), 39, asserts that *in addition to defences* asserting the absence of the requisite mental element or fault there are *also* defences of justification or excuse. He states that there is no reason to distinguish systematically between justification and excuse under the present law, although he continues to use both terms. Thus it is clear that he uses *excuse* in a fashion that is both far too unsystematic and narrow to provide guidance in interpreting section 19. The same problem exists with the usage adopted by most other commentators. *Excuse* is widely used to refer to understandable human fallibility and weakness in the face of stress and grave threat and is used as grounds to mitigate culpability for conduct for which the individual would otherwise be held fully accountable. Strict adoption of this usage would render section 19 of no force or effect, because ignorance of the law, insofar as it is permitted to be raised, functions as a *mens rea* defence that operates by alleging that awareness required for attribution of legal responsibility to the individual was absent. To bar reliance on ignorance of the law as grounds for mitigation of culpability (as an excuse, in the sense explained above) is pointless if ignorance of law is at the same time *permitted* as a ground to avoid attribution of responsibility and a finding of culpability. Without responsibility and culpability there is nothing to mitigate. Section 19 must therefore be seen to bar reliance on ignorance and mistake of law as grounds to avoid attribution of culpability, i.e. as a defence. This implies that in place of the narrow usage of excuse seen above, section 19 instead adopts a broader usage whereby an excuse may bar attribution to the accused of all or some criminal responsibility for an act that was wrong (illegal and not justified in the circumstances). Thus excuse must be understood to imply that either self-control or the capacity to exercise deliberation were impaired, or that the defendant lacked the knowledge and awareness required for deliberation. Excuse thus arises whenever the conditions required for deliberate

legality or illegality of an act according to positive law in effect at the time of commission of an act is therefore irrelevant in assessing culpability. Classification of certain types of mistake with respect to whether the victim consented as mistakes of law rather than mistakes of fact will leave some assailants with no defence whatsoever. Recognition that some mistaken beliefs

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choice are absent or inadequate for any reason. Policy may require that the individual not be permitted to rely on some types of excuses. Mistake of law is, I submit, an example of an impermissible excuse barred on grounds of policy.

My argument is as follows. A justification indicates that in the circumstances in which the particular accused found himself the act was not wrongful and therefore not illegal even though it may have had a harmful effect on some interests protected by criminal law. (Justification does, in my view, take into account facts about the accused as well as the circumstances; however, this merely particularizes but does not subjectify a defence of justification.) An excuse, by contrast, bars attribution of criminal responsibility to the accused for an act that was wrong. With these definitions all defences (other than procedural or process-related ones, such as double jeopardy) ultimately can be analyzed in terms of the concepts of justification or excuse. A defence strategy that attempts to raise a reasonable doubt about whether the offence charged has been proven will either assert that what was done was not wrongful (i.e., justifiable), or that responsibility of the type required for conviction of the offence as charged cannot be attributed to the accused, (i.e., the accused is excused, not held culpable for causing a wrong). Some defences such as self-defence have elements of both justification and excuse. Duress and necessity are defences that have been analyzed both in terms of both justification and excuse and each of these rationales separately and independently. A recent example of alternate approaches to analysis of necessity is provided by the reasons of Dickson, C.J.C., and Wilson, J., in *R. v. Perka*, [1984] 2 S.C.R. 232. Controversy over analysis of the nature of the defence of duress does not appear to be at an end either.

The position adopted here is closer to that developed by George Fletcher, who takes the distinction between justification and excuse seriously, than it is to that taken by Donald Stuart, who attaches no significance whatsoever to the distinction and uses the terms *justification* and *excuse* "interchangeably along with the neutral general label of 'defence'." See George Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown and Company, 1978); cf. Donald Stuart, *Canadian Criminal Law* (Toronto: Carswell Company Ltd., 1982), 380. There are significant differences between George Fletcher's application of the distinction and my own, however (as the comment above about "particularization" suggests) and, not surprisingly, between the consequences that we see flowing from the distinction. These matters are not relevant to the problem at hand once it is realized that the present article adopts the following approach to use of the terms *justification*, *excuse*, and *defence* in interpreting section 19:

cf. Donald Stuart, *Canadian Criminal Law* (Toronto: Carswell Company Ltd., 1982), 380. There are significant differences between George Fletcher's application of the distinction and my own, however (as the comment above about "particularization" suggests) and, not surprisingly, between the consequences that we see flowing from the distinction. These matters are not relevant to the problem at hand once it is realized that the present article adopts the following approach to use of the terms *justification*, *excuse*, and *defence* in interpreting section 19:

1. A defence may be either in the nature of a justification or excuse or both.
2. All defences, other than those which attack the procedure or process as unjust or unfair, whether they be common law defences or established by statute, can be analyzed in terms of the concepts of justification and excuse; these categories are exhaustive.
3. All defences, including those often referred to as *mens rea* defences, that operate by raising a question about an element of the case that has nothing to do with establishing the illegality of what was done, but is essential to attribution of criminal responsibility for an act to the accused, are, by nature, excuses.
4. A mistake of law can never be a justification, i.e., make an otherwise wrongful act not wrongful in the sense of "not contrary to law" as charged.
5. Section 19 bars use of ignorance of the law as an excuse for commission of an offence.
6. Mistake or ignorance of the law therefore cannot be a defence to *any* offence in Canada. (But see notes 120, 177, and 179 for proposal of a Charter estoppel against the Crown in cases in which prosecution would violate constitutional standards of fairness).

about consent are mistakes of law, not fact, should therefore have a significant impact on enforcement of the sexual assault laws in Canada and in other jurisdictions that define sexual assault or rape as the commission of acts of sexual contact or intercourse without consent.

It seems improbable and incredible that a distinction which has such significance for the determination of legal guilt could be universally misapplied, without hesitation, and for so long. The most likely explanation for this long-standing error with respect to sexual offences is the sexism embedded in our legal culture, the influential residue of a long period in history in which the right of even adult women to control their bodies was highly qualified as a matter of law. Deliberation and hesitation accompany the application of a legal distinction only if the decision-maker is aware that he or she is making a decision that *could* be made differently. The same is true of non-legal distinctions as well. Habitual use of any distinction eliminates deliberation and dulls consciousness of choice. This analysis of the application of the distinction between mistakes of law and fact to the issue of consent in sexual assault therefore can be read as a study that also provides some evidence of the impact that any attitudinal bias, not only sexism, may have on the general process of applying the "law" to the "facts."

Furthermore, the analysis which follows strongly suggests that the "sexism" seen in interpretation and enforcement of the sexual assault laws is only one symptom of the much broader problems inevitably faced by any statutory criminal law regime that requires conformity with norms that are different in some respects from customary norms.<sup>7</sup> In Canada a strong common law tradition and the preservation of common law defences, insofar as these are not inconsistent with statutory provisions, tends to encourage deference to customary norms and dominant social interests in the interpretation and

7. On difficulties generated for the design of criminal law by conflict between positive law and custom, see Bruce L. Ottley and Jean G. Zorn, "Criminal Law in Papua New Guinea: Code, Custom and the Courts in Conflict," *American Journal of Comparative Law* 31 (1983): 251. A growing body of literature attests to the fact that analogous problems exist in all societies in which an identifiable aboriginal population has survived colonization and retains its own culture and customs. My understanding of these and related issues in Canadian society has been enhanced by the research and experience of my students communicated to me in unpublished seminar papers. See in particular, Paul Chartrand (now Director, Native Studies, University of Manitoba), "Sentencing Natives in Canada" (1982), and Ron Majacich, "The Role of the Judge in the Far North" (1986). See also Livingston Hall and Selig J. Seligman, "Mistake of Law and *Mens Rea*," *University of Chicago Law Review* 8 (1940-41): 641, 653.

Similar issues are raised by enactment of new laws and by decisions to enforce laws that have been widely ignored in a society since their enactment. A contemporary example in Canada is provided by the recent (albeit still highly selective) enforcement of laws prohibiting influence peddling in government. In *R. v. Barrow* (1984), 14 C.C.C. (3d) 470 (N.S.C.A.) the defendant, a "bagman" for the Liberal Party in Nova Scotia, argued that he honestly believed that the practice of extracting political contributions from companies as a condition of their receipt of government contracts was not illegal. Senator Barrow explained that the practices "did not originate with that committee [his N.S. Liberal Party finance committee], but rather existed long before it was formed." 14 C.C.C. (3d), 490. Despite the plea of honest belief based on custom and practice ("everybody does it;" "that's how political parties are funded") the Court of Appeal categorized the mistake as one of law providing the Senator with no defence. See Hall and Seligman, "Mistake of Law," 648, on the influence of judicial decisions on community mores.



enforcement of statute law.<sup>8</sup> This phenomenon can be prevented from defeating effective enforcement of statute law only by a thorough grasp of the implications of adoption by society of legislated norms that displace, for legal purposes, all conflicting and inconsistent customary norms governing the same subject matter. It must come to be generally understood that neither ignorance nor misunderstanding of legislated norms, legal standards for social conduct, is a valid reason to excuse illegal conduct even if the result is conviction and punishment of agents who act intentionally but without awareness of wrongdoing, or even with the honest belief that what they are doing is not only "not wrong," but positively "right" or completely legitimate because it conforms to widely held community norms, i.e. custom.<sup>9</sup>

This proposition may sound outrageous to ears schooled in a criminal law tradition that has abhorred conviction for a crime of anyone who lacks *mens rea*, and assumes that *mens rea* always involves "consciousness of wrongdoing," a self-consciously guilty mind.<sup>10</sup> But it must not be forgotten that the tradition also presumed that all sane individuals could appreciate the difference between "right" and "wrong" and knew the law. Those presumptions are of dubious validity for a statute-based legal system under contemporary social conditions.<sup>11</sup> The era when the criminal law could be said to reflect shared

8. Another Canadian example of the effect of social attitudes and customary definitions of particular "crimes" on enforcement of criminal law defined by statute is seen in the area of injuries and death in the workplace. The Criminal Code is rarely invoked in response to industrial accidents although its use would often arguably be fully appropriate. See Harry J. Glasbeek, "Are Injuring and Killing at Work Crimes?," *Osgoode Hall Law Journal* 17 (1979): 506. Pollution of the environment, particularly as it involves highly toxic or extremely hazardous substances, or on-going activities with a major effect over time, is another example of an area to which criminal law could be applied although custom has not defined these types of conduct as crimes and prosecutors have tended not to challenge custom in this regard. *Crimes Against the Environment*, Working Paper 44 (Ottawa: Law Reform Commission of Canada, 1985).
9. The primary function of positive law is to establish and enforce standards of conduct. Determinations of individual culpability are necessary as a means to achieve that end. Reliance on community standards to determine when legal standards may be enforced is counter-productive when the standards are in conflict. See L. Hall and S. J. Seligman, "Mistake of Law," 654.
10. Donald Stuart, for example, appears to imply that *mens rea* must have this wide sense if it is to be meaningful when he states, referring to the hypothetical conviction of a person who smokes marijuana believing it to have been decriminalized and whose mistake cannot exonerate because of section 19, that "It would surely be empty formalism to argue this does not cut across our usual fierce determination to rest criminal responsibility on personal fault." Stuart, *Canadian Criminal Law*, 265-66. Many scholars, however, find it difficult to see, on theoretical grounds, why a mistake of law ought to excuse (negative attribution of responsibility to an agent for an act). See A. T. H. Smith, "Error and Mistake of Law in Anglo-American Criminal Law," *Anglo-American Law Review* 14 (1985): 3, 21. If ignorance or mistake of law can excuse then the principle of legality is at risk and our legal system, now oriented towards regulation of conduct by rules of universal application designed to prevent harm to collective and individual interests, would be transformed into a guardian of personal morality — no liability under the rules without conscious moral transgression. As long as we maintain a rule based system of law, Donald Stuart's compassion for the individual offender must find its expression only in the principles of sentencing and constitutional principles of fairness. To do otherwise will create more problems in the theory of criminal law than it will solve. And see note 11.
11. Madame Justice Wilson, writing concurring reasons in Reference Re Section 94(2) of Motor Vehicle Act, R.S.B.C. 1979, c. 288 (1985), 48 C.R. (3d) 289 (S.C.C.), comments specifically on the fact that Canada has a statutory criminal law, not a common law of crimes. This fact must be born in mind when considering the implications of case authority and criminal law

social mores, every man's view of right and wrong, is gone. Whether there ever *really* was such an era is a matter that need not concern us here. It suffices for the present purposes to establish that those presumptions are not tenable in general at present. Future consensus, perhaps as a result of generations of experience of social life subject to a uniform statutory criminal law, is possible. But pretending that our society is *now* one in which shared values can be readily and incontrovertibly identified in each and every social situation will not make it so. And pretense is not a proper foundation for the criminal law if it is to be both "just" and effective.

Opinions about what the law "is" or "means" are based on past experience of the effects or impact of law in society. Legal and social change often requires, or suggests and comes to be seen to require, new interpretations of existing law that may conflict with previous ideas about what the law means and how key principles are to be applied which were grounded on and developed to explain, past experience or to rationalize past practice. In periods of major social or legal change, such conflict may seriously compromise achievement of the goal of administration of justice according to the "rule of law" if *beliefs* about what the law requires are permitted to be raised in defence. Interpretation and enforcement of the sexual assault provisions of the Criminal Code appear to be affected by such conflict, and the resultant compromise is clear.<sup>12</sup>

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doctrine for interpretation of current law. Caution must be used, otherwise modern analysis will proceed as if ancient distinctions, whose origins lie beneath those of medieval natural law and whose shadow lies across the entire record of the common law, are relevant *in toto*. In the Reference case the issue was whether section 94(2) of the Motor Vehicle Act creating an absolute liability offence for which the punishment was a mandatory term of imprisonment violated the principles of fundamental justice protected by section 7 of the Charter of Rights and Freedoms. Madame Justice Wilson states: "My colleague, in finding that s. 94 offends the principles of fundamental justice, has relied heavily upon the common law, which precluded punishment in the absence of a guilty mind. We are not, however, dealing with a common law crime here. We are dealing with a statutory offence as to which the legislature has stated in no uncertain terms that guilt is established by proof of the act itself." 48 C.R. (2d), 330. She later concludes, however, that imposition of "a mandatory term of imprisonment for an offence committed unknowingly and unwittingly and after the exercise of due diligence is grossly excessive and inhumane." 48 C.R.(2d), 333. It is on *this* latter ground that she finds that the section violates the Charter.

Madame Justice Wilson's approach is consistent with the approach adopted in this article to interpretation of the law of sexual assault. Whether there was conscious wrong-doing is one of a number of criteria relevant to the determination of appropriate sentence; however, this criterion has no relevance to the determination of legal liability for the offence itself unless the definition of the offence specifically provides that knowledge of illegality is an element of the offence. (Note: this may be regarded as a controversial assertion and is pursued below.) Conviction for the offence follows proof that the accused was aware of each element of the offence as a matter of fact. Normative awareness, or lack thereof, is a matter to be considered at sentencing. Or, to put it another way, in the late twentieth century, in Canada, persons are not convicted of criminal offences because they are "wicked" but because they violated a provision of positive law. First we convict, *then* we decide on an appropriate societal response. Depending on all the circumstances, the response can be anything from an absolute discharge to life imprisonment.

12. At the micro-level, the same phenomenon occurs even in the absence of major legal and social changes. If one accepts that what the law "is" must be ascertained by how it is interpreted, it follows that the "law" to which we refer on any given day in attempting to adhere to the law is not necessarily the same as the "law" that will be used to determine whether our attempt to be "law-abiding" was successful. Convictions are based on the law as it is understood by the trial judge. Significant differences between the law as it is at trial and as it was reasonably understood to be at the time of the offence are a matter for justice in sentencing. Conflict

Although this article analyzes the function of classification of "mistakes" in detail only with respect to sexual assault laws in Canada, it is suggested that the central proposition argued for in this context applies with equal force to statutory criminal law in general. *The proposition is that a statutory criminal law is generally enforceable only if all defences based directly or indirectly on belief in the validity of extra-legal norms that authorize infringement of rights protected by the criminal law are barred.*<sup>13</sup>

Sexual assault, like the now repealed offence of rape,<sup>14</sup> is an offence which requires proof of *mens rea* for conviction. An honest belief that a sexual

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arises in those cases in which justice in sentencing threatens to defeat the very goals of the law. See notes 19-25 and accompanying text.

13. This proposition is drafted with the problems posed by the judgment by Wilson, J., in *Perka*, [1984] 2 S.C.R. 232, as well as the issues central to the present article, in mind. (I regard the two sets of problems as subsets of the same larger problem — that of developing the implications of human rights law for criminal law.) She argues that although justification as well as excuse should be available as a rationale for the necessity defence, any justification for commission of an offence must be based on a conflicting duty of positive law, not a merely ethical duty. Thus rescue of a stranger in the absence of a legal duty to rescue would provide no justification for the commission of any offences of trespass or property damage undertaken for the purpose of rescue. My position is that there is a hierarchy of rights implicit in statutory criminal law. If there were no such hierarchy, it would be impossible to weigh conflicting legal duties or to evaluate the proportionality of harm caused and prevented as Wilson, J.'s, own approach requires. Since there is such a hierarchy, further re-enforced by the protection extended to life, liberty, and security of the person by section 7 of the Charter, it can be used to provide a basis for the necessity defence as a justification in cases (such as the rescue case above) involving a conflict between a positive legal duty (prohibition of property damage) and a right protected by statutory criminal law (and the Charter) such as life. Infringement of a protected right to protect a conflicting and superior protected right would be justified. The proposition in the text would thus permit defences based on extra-legal norms insofar as those norms protected rights or interests that: (1) are also protected by the criminal law; (2) in the circumstances of the case were in conflict with the right or interest against which the offence was committed; and (3) are superior in the criminal law hierarchy to the right or interest protected by the prohibition against which the offence was committed. This is consistent with my position on the necessity defence sketched above.
14. Section 143 of the Criminal Code, R.S.C. 1970, c. C-34, repealed by The Criminal Law Amendment Act, S.C. 1980-81-82, c. 125, defined "rape." Section 143 provided that: "A male person commits rape when he has sexual intercourse with a female person who is not his wife,"
  - (a) without her consent, or
  - (b) with her consent if the consent
    - (i) is extorted by threats of fear or bodily harm,
    - (ii) is obtained by personating her husband, or
    - (iii) is obtained by false and fraudulent representations as to the nature and quality of the act.

Section 244, in effect since January, 1983, provides:

  - (1) A person commits an assault when
    - (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
    - (b) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose; or
    - (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
  - (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.
  - (3) For the purposes of this section, no consent is obtained when the complainant submits or does not resist by reason of
    - (a) the application of force to the complainant or to a person other than the

transaction is consensual is therefore a complete defence to a charge of sexual assault, as it was to a rape charge, precisely because absence of consent by the victim is one of the essential elements of the definition of the offence. Conviction requires proof of *mens rea* (i.e., intent, recklessness, or wilful blindness) with respect to *each* element of the offence, including the absence of consent by the victim. Honest belief in consent, a mistake of fact with respect to consent, is a live issue, however, only if the trier of fact is convinced beyond a reasonable doubt that there was no consent and there is some evidentiary basis for the mistaken belief in consent. The belief need not be reasonable, but it must be honest. Mr. Justice Dickson (as he then was) in his dissenting reasons in *Pappajohn* suggested that a mistaken belief in consent will be raised in defence at trial only infrequently, and that when it is raised the common sense of the trier of fact can be relied on to distinguish the “genuine” mistake, negating a culpable state of mind, from the “specious.”<sup>15</sup>

Mr. Justice Dickson’s observation that the incidence of reliance on the defence of mistake of fact at trial in rape cases is probably low, appears to be accurate. The reason the defence arises in so few cases that proceed to trial probably lies in the process and criteria by which complaints are screened, however, rather than failure by assailants to raise a mistake of fact defence. Complaints involving evidence of grounds for a mistaken but reasonable belief in consent are often cases in which the same evidence also tends to be seen to raise a reasonable doubt with respect to non-consent itself. Such cases are probably not ordinarily selected for prosecution because of the high probability of a dismissal or acquittal in which there are grounds for doubt not only that there was *mens rea*, but also that an act which constitutes the *actus reus* of an “offence,” as such, even occurred. Cases in which there is no basis for doubt on the issue of non-consent, and no evidentiary basis for a mistaken belief in consent, are cases that tend to be disposed of on a guilty plea if charges are laid. Thus it is only the residual class of complaints, in which an honest belief based on less than reasonable grounds is put forth as a defence, that, of all the cases involving a “mistake” issue, are apt to be seen to require a trial. Assailants whose mistakes seem “reasonable” to the police or prosecutor are most probably never charged. Defendants who are charged and who lack an evidentiary basis for a defence of mistake, or whose mistake is so unreasonable as to lack all credibility, are, if no other line of defence is available, probably urged by their counsel to plead guilty.

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complainant;

(b) threats or fear of the application of force to the complainant or to a person other than the complainant;

(c) fraud; or

(d) the exercise of authority.

- (4) When an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused’s belief, to consider the presence or absence of reasonable grounds for that belief. 1980-81-82, c. 125, section 19.

15. [1980] 2 S.C.R. 120, 52 C.C.C. (2d) 481, 111 D.L.R. (3d) 1, 14 C.R. (3d) 243, 266-67.

The defence of mistake of fact thus has far greater *practical* significance for decisions with respect to enforcement of sexual assault laws than it may at first appear to have. The appellate decisions in those few rape cases in which a mistaken belief in consent was at issue<sup>16</sup> provide police, prosecutors, and defence counsel with guidelines for interpretation of the law of mistaken belief in consent. These guidelines continue to apply to interpretation of this particular issue as it arises under the new sexual assault provisions. This legacy will probably continue to influence the exercise of discretion with respect to prosecution of sexual assailants for some time. That will be unfortunate if it prevents issues (such as the one discussed in this article), which could radically alter the enforcement of the laws on sexual assault, from being considered by judges. Judges can only decide questions posed by the parties. Old familiar questions and incremental variations thereon necessarily tend to elicit familiar answers.

Unless prosecutors adopt a fresh approach to the issues of consent and mistaken belief in consent, in which the legal definition of consent is given more emphasis and societal definitions of sexual assault proportionately less significance, community mores and commonly-held myths rather than law will continue to determine the extent to which an individual's right to freedom from sexual assault is protected by the criminal law. Simple adoption of the approach to analysis of consent issues developed under the previous "rape" laws will ensure that there will be no discernible change in the actual pattern of law enforcement under the new sexual assault laws from that which existed under the "rape" provisions. Any change that does occur will be marginal and attributable, not to the change in the law as such, but rather to the influence of recent discussion and debate on societal attitudes.

Heightened public awareness of sexual assault as a social problem may result in a few more "weak" cases being selected for prosecution, and a few more convictions, as the credibility of some assailants' explanations is more carefully scrutinized.<sup>17</sup> By contrast, an actual re-orientation of attention and

16. *R. v. Plummer and Brown* (1975), 24 C.C.C. (2d) 497 (Ont. C.A.); *Leary v. The Queen* (1977), 33 C.C.C. (2d) 473 (S.C.C.); *Bresse, Vallieres and Theberge v. R.* (1978), 7 C.R. (3d) 50 (Que. C.A.); *D.P.P. v. Morgan*, [1976] A.C. 182, [1975] 2 All E.R. 347 (H.L.); *Pappajohn v. R.*, [1980] 2 S.C.R. 120; *Trottier v. R.* (1981), 58 C.C.C. (2d) 289 (B.C.C.A.); *R. v. Deol, Gill and Randev* (1981), 58 C.C.C. (2d) 524 (Alta. C.A.); *R. v. Bulmer, Illingworth and Laybourn* (1983), 10 C.C.C. (3d) 256 (B.C.C.A.); *Sansregret v. R.*, [1985] 45 C.R. (3d) 193 (S.C.C.), per McIntyre, J., affirming (1983), 37 C.R. (3d) 45, 10 C.C.C. (3d) 164, [1984] 1 W.W.R. 720 (Man. C.A.). Mistaken belief in consent was also at issue in *R. v. Frankland* (1985), 23 C.C.C. (3d) 385 (Ont. C.A.), in which the appeal was from a conviction for attempted rape. Under the new legislation, see *R. v. Cook* (1985), 46 C.R. (3d) 129 (B.C.C.A.).
17. Statistics Canada reports that: "Yet while relatively fewer women are victims of crime, police statistics indicate that since the mid-1970s, the increase in sexual offences against women being reported, and recorded by police, has been greater than comparative increases in other types of violent offences. Unfortunately, it is not known to what extent this increase reflects an actual increase in the incidence of these offences, or how much is accounted for by a greater tendency for victims to report attacks or for police to record them.

"Between 1976 and 1982, the rate of sexual offences, nearly all of which are committed by men against women, increased 22%, while the rate for all other violent offences (excluding robbery) increased by 13%. In terms of specific offences, the largest increase of any violent crime in recent years was for rape (Table 4). During the 1976-82 period, the number of rapes for 100,000 population rose 29% from 7.9 to 10.2 (Table 4). At the same time, the rate for

indecent assault against women rose 25%. On the other hand, the rates for homicide plus attempted murder, and assault went up by only 14% and 13%, respectively.

"Women are also more likely to be victimized by an acquaintance or relative. The Victimization Survey reported that 44% of all sexual assaults, other assaults and robberies against women were committed by acquaintances or relatives compared with 26% of those against men (Table 5). As well, 13% of assaults and 7% of sexual assaults against women were committed by relatives. These percentages for men were almost negligible.

"Unreported Offences: As was noted previously, not all crimes come to the attention of the police. The Victimization Survey found that only 33% of all personal incidents (violent offences plus personal thefts) were ever reported to the police, however, all types of offence were more likely to be reported by female victims than by male victims (Table 6). Reporting of offences involving violence was also generally low: just 34% of all assaults and only 39% of sexual assaults on women were reported to the police.

"There are significant differences, though, in the reasons cited by victims of sexual and non-sexual offences for failure to report these incidents to police. For non-sexual assaults and robberies, the most common reasons were that the incident was "too minor" and that police could do nothing about it (Table 7). The feeling that police could do nothing about the incident was also a major reason for not reporting sexual assaults. Almost half (47%) of sexually assaulted women cited this reason, but concern about the attitude of police or courts and fear of revenge by the offender were also prominent reasons for not reporting sexual assaults, whereas these were minor reasons for not reporting other personal offences. Concern about the attitude of police or courts was cited by 47% of women who had not reported sexual offences, and 35% said they were concerned about revenge. By comparison, generally fewer than 20% of victims of other assaults and robbery were deterred by police or court attitudes, or fear of revenge.

"How Police Handle Sexual Crimes: Police forces in Canada generally clear or solve about 60% of sexual offences (Table 8). This compares with almost 70% for other violent crimes and over 80% when robbery is excluded. The high "success" rate of the police in solving non-sexual assaults, however, has been achieved largely through cases that are cleared otherwise, possibly because victims refuse to press charges. When only the proportion of offences cleared by charge is considered, sexual offences are more likely to result in charges than other assaults and robbery — 39% to 32%.

"The police record in solving and prosecuting sexual offences has changed only marginally in recent years. Between 1977 and 1982, clearance rates for sexual offences remained stable; for other violent crimes the proportion cleared by charge declined by several percentage points, while the percentage solved otherwise increased slightly (Table 8).

"The trend for rape, however, is different (Table 9). The total clearance rate for rape fell from 65% in 1971 to 56% in 1982. At the same time, offences cleared by charge declined from 45% to 41% while those cleared otherwise dropped from 20% to 15%.

"Police also exercise considerable discretion in deciding which offences reported to them are recorded as crimes. The actual number of offences — the UCR figures quoted in this report — consist of all incidents reported to the police, minus those that are classified as unfounded, that is, an investigation established that the crime did not happen or was not attempted.

"Sexual offences, and in particular rape, are characterized by high proportions of offences which are classified as unfounded. In 1982, 30% of reported rapes were listed as unfounded, compared with just 6% of all violent offences. The unfounded rate for rape, however, has declined steadily from 43% in 1972. Again, it is not clear whether this decline has resulted because the nature of the incidents being reported has changed or whether it is because police norms pertaining to the recording of incidents have evolved." *Women in Canada: A Statistical Report*, Social and Economic Studies Division, Statistics Canada (Ottawa: Minister of Supply and Services Canada, March, 1985), 104.

Those statistics dealt only with the matters of incidence, reporting and charging. Conviction rates are required to complete the picture of the official response to the problem of sexual assault. There is no reason to believe that the conviction rates under the new legislation are markedly different from those under the old rape laws, however I have no reliable statistics dealing with this question. The figures projected by Lorenne Clark and Debra Lewis are probably still roughly representative of the incidence to conviction ratio: "The progress of a rape case through the criminal justice system reflects a highly selective process of elimination. Only a fraction of all rapes are reported; only a fraction of reported rapes are classified as founded; only a fraction of founded cases lead to an arrest; and only a fraction of suspects arrested are convicted. Our own study provided us with a vivid illustration of how few rapes ever lead to trial and conviction. We believed that a rape had most likely occurred in 104 of the 116 cases we studied. If only 40% of all rapes are reported (the highest of all estimated reporting rates), then these 104 reported rapes represented the approximately 260

emphasis would result from classification of some types of mistakes as mistakes of "law" rather than mistakes of "fact." The issues and questions relevant to assessment of the typical sexual assault complaint would be different in key respects than they are under the current approach. A new pattern of decisions with respect to charging, prosecution, guilty pleas and conviction would gradually emerge as a consequence.

The diagrams in figures 1, 2, and 3 below provide an illustration of the changes in approach to the distinction between mistakes of law and fact that are envisaged and the effects on enforcement of the law it is anticipated these changes would have. The distinction between mistake of fact and mistake of law as it is used in law generally; the differences between the legal and social definitions of "sexual assault" and between "consent" and "submission," in general, and in the context of sexual transactions; and the recent controversy between the subjectivist "purists" and others with respect to *mens rea* in general; and the *mens rea* of rape and sexual assault in particular, are all relevant to the problem at hand. Therefore each of these matters must be considered if the approach proposed in this article is to be understood and its potential impact appreciated. The diagrams in figures 1, 2 and 3 in the text may help the reader to grasp in a preliminary way what is proposed, how it is different from the present approach to analysis of mistake of law and sexual assault, and what implications the proposed approach has for effective protection of the right to be free from sexual assault.

### *Mistakes of Fact and Law*

The distinction between matters of fact and law<sup>18</sup> is often an uneasy one in criminal law, especially in those situations in which the distinction makes an

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rapes which actually occurred. The police classified only 42 of the 116 reported rapes as founded, and arrested 32 suspects. Given an average conviction rate of 51.2%, approximately 17 suspects were probably convicted. Thus only 17 out of approximately 260 rapists are likely to be convicted in Metropolitan Toronto — only 7%. That is the highest estimate that any of the figures, at any stage of the process, would justify. As such, it stands as something of a monument to injustice, and a serious indictment of our criminal justice system." Clark and Lewis, *Rape*, 57. They concluded that analysis of the conviction rate confirmed "that Canadian society tacitly condones rape."

18. Over the years many scholars have written about mistakes of law, the distinction between mistakes of fact and law, and closely related issues. See Terence Arnold, "State-Induced Error of Law, Criminal Liability and *Dunn v. The Queen*: A Recent Non-development in Criminal Law," *Dalhousie Law Journal* (1977): 559; Beinen, "Mistakes," Peter Brett, "Mistake of Law as a Criminal Defence," *Melbourne University Law Review* 5 (1966): 179; Margaret Friedlander Brinig, "The Mistake of Fact Defense and the Reasonableness Requirement," *George Mason School of Law* 2 (1978): 209; Ronald A. Cass, "Ignorance of the Law: A Maxim Re-Examined," *William and Mary Law Review* 17 (1976): 671; David H. Doherty, "The *Mens Rea* of Fraud," *Criminal Law Quarterly* 25 (1983): 348; Hélène Dumont, "Étude sur L'Ignorance de la Loi," *La Revue Juridique Thémis* 13 (1978): 665; Livingston Hall and Selig J. Seligman, "Mistake of Law," Edwin R. Keedy, "Ignorance and Mistake in the Criminal Law," *Harvard Law Review* 22 (1908-09): 75; Etienne Mureinek, "The Application of Rules: Law or Fact," *The Law Quarterly Review* 98 (1982): 587; J. Newdigate, "Some Thoughts on Mistake of Law as a Criminal Defence," *Crown Counsel Review* 3 (1983): 9; D. O'Connor, "Mistake and Ignorance in Criminal Cases," *Modern Law Review* 39 (1976): 644; Rollin M. Perkins, "Ignorance or Mistake of Law Revisited," *Utah Law Review* 3 (1980): 473; John Sellers, "*Mens Rea* and the Judicial Approach to 'Bad Excuses' in the Criminal Law," *Modern Law Review* 41 (1978): 245; A. T. H. Smith, "Error

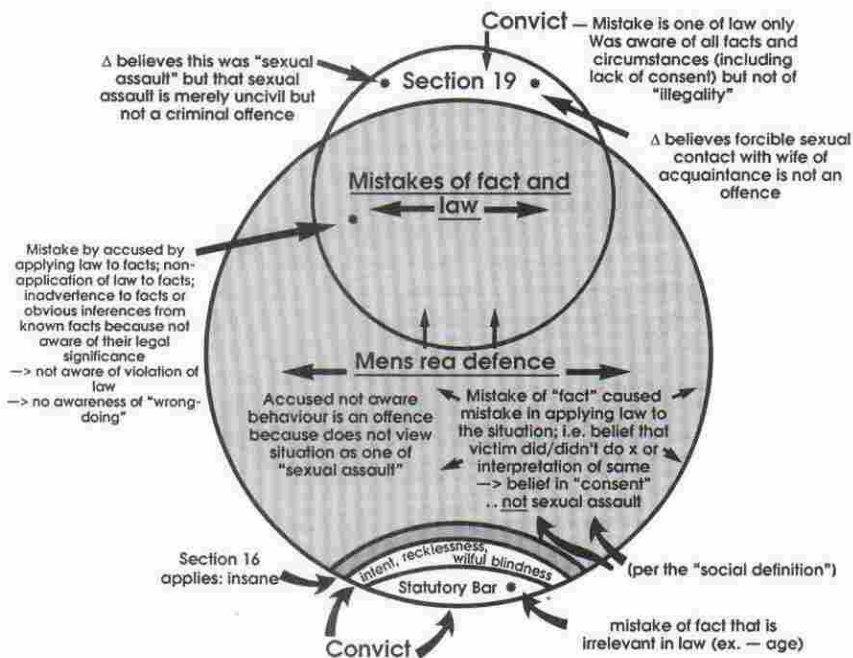


FIGURE 1

Present Approach to Sexual Assault



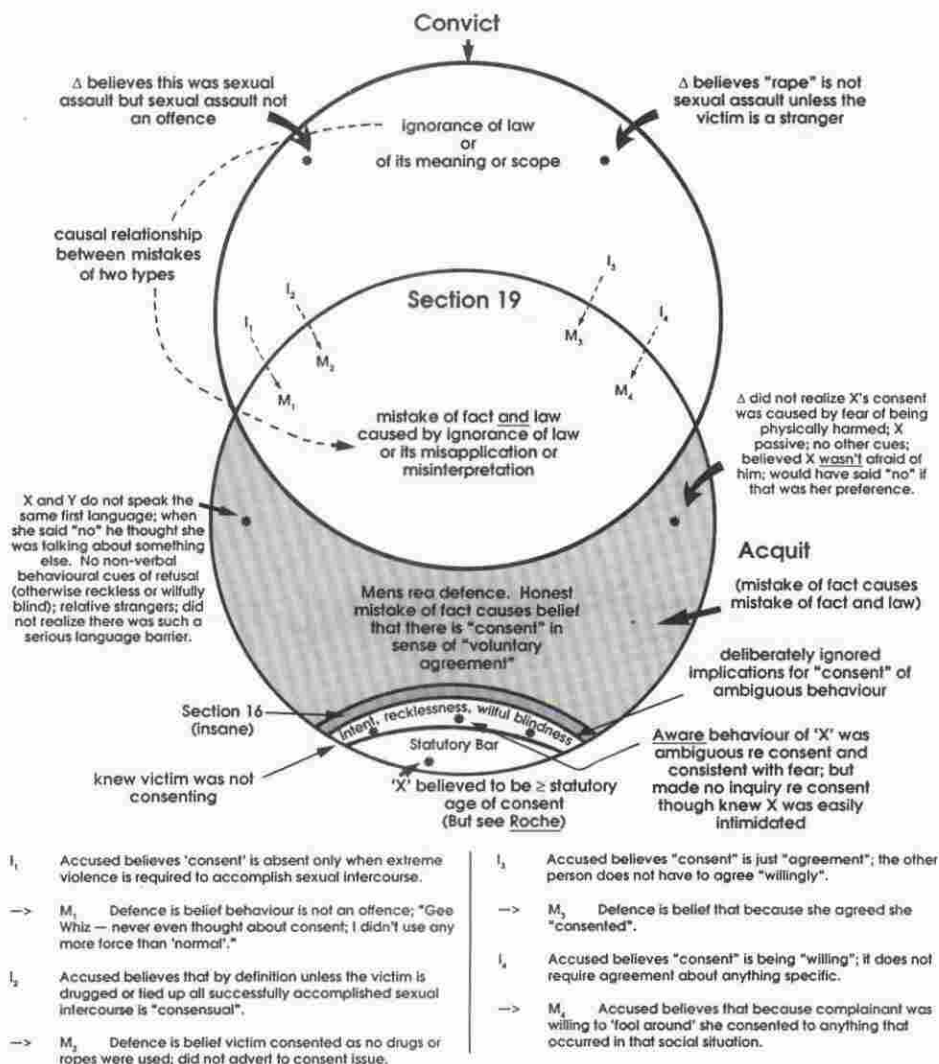


FIGURE 2

Proposed Approach to Sexual Assault

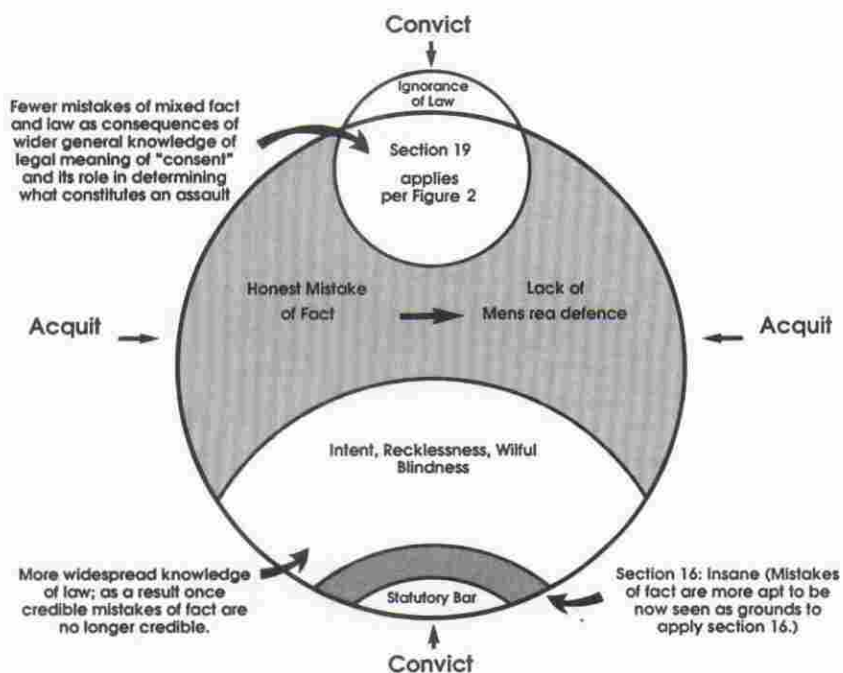


FIGURE 3

Projection of Consequences for Case Disposition of Using Proposed Approach (Fig. 2)

absolute difference to the outcome.<sup>19</sup> Although it may appear unjust to convict a person who has committed an act not knowing that the act was an offence at criminal law, the traditional approach has been to reject ignorance of the law as a defence.<sup>20</sup> When appropriate, the actual impact of conviction on the individual is then minimized through sentencing.<sup>21</sup> To allow ignorance of the law as an excuse has been viewed as an invitation to general anarchy. It is feared that positive law would be unenforceable as each person relied on personal belief about what the law required to negative *mens rea*.<sup>22</sup>

The most common argument against this traditional approach discounts the collective interest in promoting obedience to law in deference to the right of the individual not to be punished "unjustly." In the alternative, it is sometimes argued that it is no more onerous to ascertain when and to what extent a claim by an accused that he or she was unaware of the law should negative *mens rea* than it is to evaluate a claim by the accused that he or she was unaware of relevant facts. In either case, when the mistake is an honest one, and not itself reckless or the consequence of wilful blindness, it is argued that reference to principles of criminal responsibility suggests that *mens rea* was absent and that conviction of the accused for a *mens rea* offence would therefore be unjust.<sup>23</sup>

But this is not the law. Ignorance of the law, as such, is *not* a defence to a "true" or full *mens rea* crime in Canada. Each citizen has, in effect, a legal duty to know and understand the criminal law even with respect to points of interpretation over which judges may differ.<sup>24</sup> To be ignorant of the law is to be

and Mistake of Law;" Barry Jeffery Stern, "Consciousness of Wrong-doing: *Mens Rea* in Alaska," *Alaska Law Review* 1 (1984): 1.

19. Compare, for example, *R. v. Baxter* (1982), 6 C.C.C. (3d) 447 (Alta. C.A.), discussed below in text at note 30, and *R. v. Phillips* (1978), 44 C.C.C. (2d) 548 (Ont. C.A.).
20. See Hale, *Pleas of the Crown* (1680), 42; Blackstone, *Commentaries* (1772), vol. IV, 27; *Halsbury's Laws of English*, 4th ed. (1976), Vol. 11, para. 20 which states: "[A] criminal intent does not involve knowledge on the part of a defendant that his acts or omissions were against the law and constituted a crime;" and Williams, *Textbook*, 405.
21. See *R. v. Baxter* (1982), 6 C.C.C. (3d) in which, having set the acquittal aside, the Alberta Court of Appeal ordered an absolute discharge. Glanville Williams suggests that proof of care in attempting to ascertain the law should be a strong argument in favour of an absolute discharge. See Williams, *Textbook*, 406. For a case in which this was undoubtedly a factor leading to an order of absolute discharge, see Campbell and Mlynarchuk (1973), 10 C.C.C. (2d) 26 (Alta. Dist. Ct.).
22. Williams, *Textbook*, 406; O.W. Holmes, *The Common Law* (1881), 48, in which he said: "Public policy sacrifices the individual to the general good ... It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales." Campbell and Mlynarchuk, 31; Flemming (1981), 43 N.S.R. (2d) 249 (Co. Ct.), per O'Hearn, Co. Ct. J., who stated "the rule is based not on justice but on a public policy favoring the largest possible conformity with the law (at 262); Jerome Hall, *General Principles of Criminal Law* 2nd, 1960, 383.
23. Both Glanville Williams and Donald Stuart appear to favour changing the law to permit ignorance and mistake of both law and fact to be dealt with as matters that may excuse just insofar as each negatives *mens rea*, or fault, in the case of a strict liability offence. See Williams, *Textbook*, 405; Stuart, *Canadian Criminal Law*, 261. As to my own contrary view, see note 139. See also notes 10 and 11.
24. The most striking recent example of this in Canada is seen in Campbell and Mlynarchuk (1973), 10 C.C.C. (2d) 26 (Alta. Dist. Ct.). An Edmonton go-go dancer had removed all her clothing while performing, believing it was lawful to do so in reliance on a decision by a

at risk of “unintentionally” committing a “criminal offence” for which one will be fully liable at criminal law as long as the act itself is committed intentionally, recklessly, or with wilful blindness. Any act committed with the requisite state of mind (i.e., awareness of the material facts) is an offence if positive law, however obscure, so defines it.<sup>25</sup>

Recent Canadian cases involving the distinction between a mistake of fact and a mistake of law demonstrate that judges regard the distinction as one which can be made and which is meaningful, or non-arbitrary. In other words, the distinction is regarded as valid, and is relied on to distinguish those mistakes which are grounds for acquittal from those which must be rejected as providing no defence whatsoever. Some specific applications of the distinction may at first appear difficult to defend, as examples drawn from recent cases considered below demonstrate.<sup>26</sup> A cynic might well argue therefore that the distinction is merely a convenient technical device that enables judges to manipulate outcomes.<sup>27</sup> It is quite true that conviction or acquittal can depend entirely upon whether a mistake is found to be one of fact or law.<sup>28</sup> The individual, who would have a defence negating *mens rea* and dictating an acquittal if the mistake were classified as being one of fact, will be barred from making this defence if the mistake is classified as a mistake of law.

It is important to note, however, that many of the recent Canadian decisions in which mistakes have been held to be mistakes of law involved breach of prohibitions that arguably would have been rendered generally unenforceable if mistakes of the type in question were classified as mistakes of fact. Public policy concerns and the interests of administration of justice and law enforcement, rather than simple convenience and expedience in the individual case, thus appear to be the considerations that have been decisive in application of the distinction. This is further confirmed by the fact that convictions flowing from the classification of a mistake as a mistake of law are sometimes tempered by a minimal penalty or even by an absolute discharge when commission of the offence is not seen to warrant punishment of a particular individual in the whole of the circumstances.<sup>29</sup> It is suggested that

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Supreme Court Judge in Calgary in a case involving a similar issue. She was convicted, however, on the ground that she had made a mistake of law because the decision on which she relied had been reversed by the Alberta Court of Appeal by the time of her own trial. Subsequently the Supreme Court of Canada reversed the decision of the Court of Appeal and restored the law to what Campbell had believed it to be when she was charged originally.

25. But see text at note 132, for a bar to conviction for contravention of an unpublished regulation.
26. Christine Boyle notes that the distinction between mistakes of fact and law involves “difficulties” in the context of determining whether there is *mens rea* for offences involving minors subject to special provisions restricting the age of effective consent. See Boyle, *Sexual Assault*, 104. Donald Stuart also describes the distinction between mistakes of law and mistakes of fact as “difficult.” Stuart, *Canadian Criminal Law*, 265. They are not alone in this view. Smith remarks, “A layman might perhaps be forgiven for thinking that only lawyers could contrive such a distinction.” Smith, “Error and Mistake of Law,” 13.
27. Christine Boyle refers to the judicial decision to classify some mistakes as ones of fact as “a popular device for avoiding injustice caused by the unsatisfactory nature of this distinction.” Boyle, *Sexual Assault*, 104. Donald Stuart states that in many cases “one suspects courts are bending over backwards to characterize a mistake as one of fact to avoid the harsh ignorance of the law is no excuse rule.” Stuart, *Canadian Criminal Law*, 289.
28. See note 19.
29. See note 21.

once the distinction between mistake of fact and mistake of law is viewed in this light, as an essential tool of public policy in the modern state, judges can use the distinction, combined with their control over sentencing, to designate certain *legal* definitions (which may or may not correspond to generally recognized social definitions commonly used in the community) as ones of which members of the public can remain ignorant only at their extreme peril. This will permit effective enforcement of sexual assault laws (as well as other *mens rea* offences or "true crimes" dealing with harms caused by risk generating activities the most common defence to which is failure to advert to, or accurately assess, the risk) without compromise to the fundamental principle of criminal law that no one should be found culpable and convicted of an offence requiring *mens rea* unless they are found to have acted with awareness of all the facts and circumstances that constitute the offence. This proposal will be examined in greater detail below in a longer discussion of *mens rea*, mistake, and inadvertence.

The present Canadian approach to the defence of mistake of law is to be found in recent appellate court decisions. In *Regina v. Baxter*,<sup>30</sup> a 1982 decision of the Alberta Court of Appeal, the judge ruled that the erroneous belief that a "Constant Companion" belt buckle knife was not a prohibited weapon, but was a mistake of law, not fact. The Crown's appeal from the accused's acquittal on a charge of possession of a prohibited weapon was therefore allowed. The accused was aware of the physical characteristics of the weapon and he did intend to possess the weapon. At the same time he believed that the weapon was not "prohibited." His mistake was found to be a mistake about the legal classification of the weapon. Had the judge ruled otherwise, the prohibition against possession of certain weapons would have been rendered unenforceable in most cases. If a belief that a weapon is not prohibited were to be characterized as a mistake of fact, it would be a defence which the Crown could refute only by demonstrating beyond a reasonable doubt that the accused knew or must have known otherwise. In only *some* cases would it be possible to prove that. By contrast, the effect of the decision in *Baxter* is to ensure that all persons who knowingly possess a weapon without knowledge of the legal status of that weapon are liable for an offence if the weapon is one which is prohibited. Possession of a weapon of whose legal status one is ignorant puts one at risk of conviction on simple proof of intent to possess the particular weapon in question.

In *Regina v. MacDougall*, the Supreme Court of Canada affirmed the validity of the distinction between mistakes of fact and law and the applicability of section 19 of the Code to bar reliance on any mistake of law to negative the mental element of an offence.<sup>31</sup> Mr. MacDougall had been charged under section 258(2) of the Nova Scotia Motor Vehicle Act with driving a motor

30. *Regina v. Baxter* (1982), 6 C.C.C. (3d) 447 (Alta. C.A.). Note that *MacPhee* (1975), 24 C.C.C. (2d) 229 (N.S. Mag. Ct.) and *Bohman* (1974), 20 C.C.C. (2d) 117 (Ont. Dist. Ct.) have been overruled.

31. *Regina v. MacDougall* (1982), 1 C.C.C. (3d) 65 (S.C.C.). It may be noted that the Court relied on section 19 of the Criminal Code, a federal statute, even though the offence was against a provincial statute. This is arguably an improper use of section 19. However, the same *result* would be available at common law.

vehicle while his licence was cancelled. The charges were dismissed at trial and the Crown appealed against that dismissal, first to the provincial Court of Appeal, and then to the Supreme Court of Canada. Writing for the court, Mr. Justice Ritchie held that as the offence was a strict liability offence, the defence of *reasonable* mistake of *fact* was available in law. But the appeal was allowed, and a new trial ordered, on the ground that Mr. MacDougall's belief that his licence was in effect, and he was entitled to drive, was *not* a mistake of fact but a mistake of *law* affording him no defence whatsoever. There was no suggestion that Mr. MacDougall's belief was less than honest, but it flowed from his ignorance of the effect under provincial law on his operator's licence of the dismissal of his appeal against a conviction under section 233(2) of the Criminal Code. As in *Baxter* the mistake relates to a legal characterization of something, in that case an object, in this case an activity. *Total ignorance of the legal characterization in no way impedes possessing or otherwise dealing with an object or engaging in an activity with complete subjective awareness of what the object or activity is or means in an empirical or social-factual sense.*<sup>32</sup>

A contrary decision in *MacDougall* arguably would have established that in all cases in which a prohibition is a legal consequence of a legal determination of guilt, the prohibition does not become effective until the individual subject to the prohibition has received specific notification that the prohibition is in effect. In a case of the *MacDougall* type, notification of the effect of dismissal of the appeal on the licence could be routinely issued with the dismissal of the appeal itself. In some cases, however, the precise legal consequences of a particular determination may depend on variables of which the judge has no knowledge. Without such knowledge, no specific notice can be given, and the result would be suspension of the effect of the legal consequences until such time, if ever, as the individual became aware of them. Harsh though it may appear to be in some cases, on public policy grounds it does therefore appear necessary to leave the burden of knowing the law and its consequences with the individual affected. To do otherwise would reward and encourage ignorance of the law.<sup>33</sup>

Due diligence in ascertaining what the law is will not, at least in Canada, protect an accused from conviction when he or she has committed an offence in the honest and reasonable belief that the activity in question is legal. In *Molis*, in which the offence in question was trafficking in a restricted drug (MDMA) in which contrary to the Food and Drug Act, the accused asserted that he did not

32. Law can be understood as providing a matrix of meaning and significance that is superimposed on the empirical world of facts and relationships between facts, and on the non-legal social world of culture, custom, and common practice. A person can be active in the material, social world with or without knowledge of the legal significance of their activities. When activity — doing things, accomplishing ends — requires dealing with entities and relationships that *exist in law only* and correspond to no material or social fact or relationship, such that all mistakes are mistakes of interpretation of the meaning or application of law, mistake of fact, by definition, is unavailable as a defence. *R. v. MacDonald* (see text following note 35) provides an example of such a mistake. A “security” is a purely legal creation. To be mistaken about application of the definition of the term “security” can only be a mistake of “law.”

33. This has been widely given as one of the principal reasons for the rule barring reliance on ignorance as an excuse. See Stuart, *Canadian Criminal Law*; Holmes, *Common Law*, and the authors cited in note 18, especially Keedy, and Hall and Seligman for a historical overview.

know that the drug was restricted and that he had made reasonable efforts to inform himself of its status. In point of fact, the drug had been added to the schedule of the Food and Drug Act by regulation published in the *Canada Gazette* only *after* he had commenced manufacturing the drug, but prior to his arrest for trafficking. Like Mr. Baxter, however, the only thing Mr. Molis was unaware of at the time of the offence was the *legal* characterization of the object in his possession. In his reasons in *Molis*, Mr. Justice Lamer stated:

It is clear to me that we are dealing here with an offence that is not to be considered as one of absolute liability and, hence, a defence of due diligence is available to an accused. But I hasten to add that the defence of due diligence that was referred to in *Sault Ste. Marie* is that of due diligence in relation to the fulfillment of a duty imposed by law and not in relation to the ascertainment of the existence of a prohibition or its interpretation.<sup>34</sup>

The effect of this decision is to affirm that any liability that arises as a consequence of a mistake of law is absolute. Good faith, honesty, and effort expended to ascertain what the law is, are all of no avail to an accused who subsequently commits an offence in the belief that what he is doing is legal, as long as he or she is aware of the *empirical or social-factual elements of the activity* that constitutes the offence.<sup>35</sup>

This approach was applied to analysis of the relevance of a mistake of law to liability for a strict liability offence by the Alberta Court of Appeal in *Regina v. MacDonald*. The Crown succeeded in its appeal of an acquittal that had been granted at trial, on the ground of reasonable mistake of fact on a charge of trading in securities without a licence. At trial, due diligence in ascertaining whether certain investment contracts were “securities” had been found to be diligence in ascertaining matters of fact. In the appeal decision, however, McGillivray, J.A., stated:

It seems clear to me that Mr. MacDonald was not mistaken as to the existence of any facts. He was aware of exactly what he was doing. Every facet of what was occurring was present to his mind. What he

34. *Molis v. The Queen* (1980), 55 C.C.C. (2d) 558, 116 D.L.R. (3d) 291, [1980] 2 S.C.R. 356, 564. Donald Stuart interprets this statement as implying that in defence to a charge on a *mens rea* offence, the accused must show due diligence rather than merely raise a reasonable doubt about *mens rea*. Stuart, *Canadian Criminal Law*, 171. Clearly this is not what Lamer, J., said. It is true that the accused is not barred from raising a due diligence defence to a *mens rea* charge. The fact that such a defence is available does not mean that it must be made. Surely it is clear that Lamer, J.’s point was simply that such a defence is barred only when the offence charged is an absolute liability offence.
35. Lamer, J., clearly rejected the contention that a distinction existed between ignorance of a law and a mistake as to its meaning, scope, or application for the purposes of section 19; see *Molis v. The Queen* (1980), 50 C.C.C. (2d) 558, 563-64. *Molis* is decided on the basis that both ignorance of law and mistakes in interpretation are within the scope of section 19.

did not know was that the very thing he was doing amounted to trading in securities.<sup>36</sup>

Applying the reasoning of the Supreme Court in *Molis* and *MacDougall*, McGillivray, J.A., held that the mistake was one of application of the law and that section 19 barred reliance on such a mistake as an excuse.

It can be concluded that in applying the distinction between mistakes of law and fact, the critical question is: "Was the accused aware in the requisite sense of what, described in empirical or social-factual terms, he or she was doing or not?" If the accused had the requisite awareness, then any "mistake" or misapprehension of the legal status, legal description, or legal consequences of what he or she was doing is irrelevant to culpability. The only exceptions to this general rule in Canada are provided by statute in the Code definitions of a few specific offences (most of which are property offences) or in the Statutory Instruments Act (in the case of regulations).<sup>37</sup>

### ***Consent, Submission, and Sexual Assault***

Most of the difficulties with the legal definition of sexual assault relate to the issue of consent and arise as a consequence of incorporation of the term "consent" in section 244 of the Criminal Code. "Consent," as such, is not defined in the Criminal Code, yet consensual sexual transactions and sexual assault are, in law, mutually exclusive by definition. As a consequence, failure to understand the law of consent arguably places all parties to sexual transactions at risk of unwittingly committing sexual assault if section 19 is invoked to bar all excuses based on mistakes of law.

It might be argued that justice requires that the complexities surrounding interpretation of the legal definition of sexual assault be recognized by the enactment of a statutory exception to section 19 similar in nature to the "colour of right" exception extended when provisions of property law are incorporated in the definition of criminal offences.<sup>38</sup> This would protect all persons who act in reliance on an honest misunderstanding of what constitutes consent in law from conviction for sexual assault. Whether such an exception *should* be created is quite a different question. Approval of such a proposal would imply that: (1) it is the case that the legal definition of consent and its application in a social situation actually are too complex for the ordinary person to understand; and (2) that justice to the individual requires that a special defence be created specifically for the purpose of protecting persons charged with sexual assault who acted in reliance on an honest misunderstanding of what constitutes consent in law.

36. *Regina v. MacDonald* (1983), 3 C.C.C. (3d) 419 (Alta. C.A.), 421.

37. Statutory Instruments Act, S.C. 1970-71-71, c.38, section 11(2).

38. See section 39 (possession of moveable property under a claim of right); section 42 (claim of right to possession of dwelling house or real property and entry by a person who is lawfully entitled to possession of it); section 73(2) (detaining real property without colour of right); section 249-250.5 (abduction of person under sixteen years of age and lawful care or charge); section 283 (theft and taking or converting without colour of right); sections 386 to 402 (wilful acts against property and colour of right).



At law, "consent" is voluntary agreement.<sup>39</sup> This seems simple enough for anyone, male or female, to understand. Yet in the past, judges have often been called upon to clarify the definition of "consent."<sup>40</sup> Examination of the case law reveals that it is not the bare definition of consent, as such, that has been seen to be problematic in this and other areas of law in which consent is at issue, but rather determination of the circumstances that invalidate the legal efficacy of consent or apparent consent. Age, ill-health, and physical, emotional, and economic vulnerability have often been viewed at common law as grounds to question either the *capacity* of the "consenting" individual to make a deliberate and reasoned decision under certain conditions or the *independence* of the individual from improper influences in decision-making. Thus it is clear even just from past experience with the legal definition of consent, without reference to those further issues developed below related to what constitutes communication of "consent," that it is *not* sufficient, after all, for parties to sexual transactions to know that "consent" is "voluntary agreement." It is also necessary to know under what conditions the consent, whether "explicit" or "implied," may be seen to be invalid and of no effect for the purposes of the criminal law because voluntariness or agreement are incomplete or flawed. Granted then, that these complexities exist, do they place the ordinary person, acting in good faith, at risk of conviction for sexual assault? If so, should a special exception to section 19 be created for sexual assault?

In later sections of this article, both of these questions are answered in the negative and the reasons for both answers are used, in turn, to argue that section 19 must be applied in sexual assault cases to bar excuses that flow ultimately from ignorance or misapplication of the law of consent. To

39. *Webster's Third New International Dictionary* defines *consent* as "capable, deliberate, and voluntary agreement or concurrence in some act or purpose implying physical and mental power and free action." The archaic meaning given is "the being of one mind."

The *Oxford English Dictionary* finds the word to be derived from Latin and the Romance languages. The early French meaning was to "feel together, agree, accord" (derived from the root "sentir"). Use of the phrase meaning "consent to a thing being done" was a later development, but occurs in twelfth century French. In English the word means "to agree, to be in accord, to be at one, to agree to a proposal or request, to voluntarily agree to or acquiesce in what another proposes or desires."

40. In Canadian cases involving section 143(b) or the present section 244(3), the focus is on the issue of voluntariness and the question has often been whether voluntariness might have been intact in the circumstances. The rape and sexual assault cases (see note 16) for the most part do little more than state that consent must be voluntary or freely given, not extorted, and point out that consent and submission or failure to resist are not the same. See note 16. The comment by Coleridge, J., in *R. v. Day* (1841), 9 Car. & P. 722, 173 E.R. 1026, that: "There is a difference between consent and submission; every consent involves a submission; but it by no means follows, that a mere submission involves consent," is sometimes quoted. Judges appear to treat voluntariness as the only live issue, however, such that even a mere "submission" is equivalent to "consent" as long as the "submission" has not been shown to have been coerced. A typical definition is that used at trial and quoted in the reasons for judgment by the Court of Appeal in *R. v. Frankland* (1985), 23 C.C.C. (3d) 385 (Ont. C.A.), 390: "Now, what do we mean by consent? Consent involves knowing what is being proposed and voluntarily permitting it to be done. Mere submission does not necessarily imply consent, because a woman may consent to intercourse because of threats, or fear of bodily harm, and consent extorted in that way is, in law, not consent at all." See also *R. v. Hindle* (1978), 39 C.C.C. (2d) 529 (B.C.C.A.), 532. The only exception to this approach is seen in the reasons of Jacques, J. (*ad hoc*) writing in dissent for the Quebec Court of Appeal in *R. v. Bresse, Vallieres, and Theberge* (1978), 48 C.C.C. (2d) 78.

demonstrate that this conclusion is appropriate, it is first necessary to examine in detail issues related to the definition of "consent" and its significance for the definition of "sexual assault."

### *Consent in Myth and in Law*

The distinctions between explicit or implied consent and submission, as they relate to the legal definition of sexual assault, involve far more difficulty than may be at first apparent. The difficulties lie both at the conceptual level and in application of the legal definitions of these terms to the facts. The lay person whether male or female, assailant or victim, friend or relative who is not trained in law and is not familiar with the legal definition of consent, tends to rely on community norms and widely-held beliefs about rape and sexual assault to decide when a sexual transaction involves assault and is an offence. Studies suggest that even judges, prosecutors, and police officers continue to be strongly influenced by rape myths.<sup>41</sup> These myths<sup>42</sup> are deeply rooted in our culture and consciousness and will not be eradicated overnight.<sup>43</sup>

41. See sources cited in note 54; See also Toni M. Massaro, "Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and its Implications for Expert Psychological Testimony," *Minnesota Law Review* 69 (1985): 394, 410-423, for a useful summary of studies dealing with this issue; Wriggins, "Rape, Racism and the Law;" Marsh, Geist, and Caplan, *Rape and the Limits of Law Reform*; Sue Bessmer, *The Laws of Rape*; Patricia A. Resnick, "The Trauma of Rape and the Criminal Justice System;" and John C. LeDoux and Robert R. Hazelwood, "Police Attitudes and Beliefs Toward Rape," *Journal of Police Science and Administration* 13 (1985): 211.
42. See Massaro, "Experts, Psychology, Credibility, and Rape," 402-410, for a survey of the principal myths; on the ultimately political nature and function of these and other sexist myths, see Andrea Dworkin, *Right-Wing Women* (New York: G. P. Putnam's Sons, 1983); on the interplay of sex and race in myths, see Wriggins, "Rape, Racism and the Law;" Richard V. Ericson and Sophia E. Voumvakis, *News Accounts of Attacks on Women: A Comparison of Three Toronto Newspapers*, (Toronto: Center of Criminology, University of Toronto, 1984) on the reinforcement of common beliefs by the mass media. The following articles report on empirical studies of the attitudes and perceptions of selected respondent groups: Pat Gilmartin-Zena, "Attribution Theory and Rape Victim Responsibility," *Deviant Behavior* 4 (1983): 357; Allan Griswold Johnson, "On the Prevalence of Rape in the United States," *Signs: Journal of Women in Culture and Society* 6 (1980): 136; Neil M. Malamuth and James V. P. Check, "Sexual Arousal to Rape and Consenting Depictions: The Importance of the Woman's Arousal," *Journal of Abnormal Psychology* 89 (1980): 763; W. L. Marshall and H. E. Barbaree, "A Behavioural View of Rape," *International Journal of Law and Psychiatry* 7 (1984): 51; M. D. Pugh, "Contributory Fault and Rape Convictions: Loglinear Models for Blaming the Victim," *Social Psychology Quarterly* 46(3) (1983): 233; Zindel V. Segal and Lana Stermac, "A Measure of Rapists' Attitudes Towards Women," *International Journal of Law and Psychiatry* 7 (1984): 437; R. Lance Shotland and Lynne Goodstein, "Just Because She Does not Want to Does not Mean It's Rape: An Experimentally Based Causal Model of the Perception of Rape in a Dating Situation," *Social Psychology Quarterly* 46 (1983): 220; Bill Thornton and Richard M. Ryckman, "The Influence of a Rape Victim's Physical Attractiveness on Observer's Attributions of Responsibility," *Human Relations* 36 (1983): 549.
43. The criminal justice system can play a major role in the process of replacing "mythical" views of sexual assault, and the social definitions of sexual assault based on these myths, with views based on fact and the results of empirical studies that are relevant to the legal definitions of sexual assault. If that result is to be achieved it is necessary that prosecutors appreciate that there is a significant difference between the legal and mythical definitions of sexual assault and consent — a difference not merely of degree, but of analytic focus. Adoption of an analysis that is based on law, not myth, will transform the approach taken in prosecution of sexual assault cases. A radical shift in the way prosecutors analyse and present the issues to be decided in sexual assault cases promises to be the single most influential initiative available to eradicate myth and replace it in the public consciousness with factual accounts of the issues

The social science literature on sexual assault demonstrates that *social definitions* of rape and sexual assault are myth-based and focus primarily on the type and degree of force used by the assailant, rather than the absence of consent.<sup>44</sup> In those cases in which the label “rape” or “sexual assault” is applied, it is subject to displacement in response to information about the socio-economic status of the assailant or the demographic features descriptive of the victim.<sup>45</sup> A study by S. H. Klemmack and D. L. Klemmack<sup>46</sup>, for example, showed wide variation in use of the label “rape” by respondents from the general public over the range of situations presented, all of which fell within the legal definition of rape in Michigan. Seven situations involving a range of social situations and degrees of violence were presented. Though the stereotypical rape involves violent attack by a stranger, only 92 percent of the respondents classified as rape an attack on a woman in a parking lot by a man who beat her up and had sexual intercourse with her. At the other extreme, only 1.8 percent of the respondents identified sexual intercourse preceded by a physical struggle as rape when the assailant was a “date” or close acquaintance. Most respondents did *not* identify assault by an acquaintance in *any* situation as rape.<sup>47</sup> The results of screening of cases by police suggests that police decision-making is strongly influenced by these same variables.<sup>48</sup>

The study by Lorene Clark and Debra Lewis, still the most complete Canadian study available to date, provided evidence that most men against whom rape complaints were laid with the Metropolitan Toronto Police Department in 1970, like many respondents in the Klemmack study, viewed violent behaviour as normal for a sexual encounter.<sup>49</sup> A classic example of an assailant’s tendency to regard his behaviour as normal is provided by the statement by one of the assailants in the study that he had not used “any more force than is usual for males during the preliminaries.”<sup>50</sup> Some assailants appear to see the degree of force used as the *only* relevant issue because they do not recognize that women have a right to refuse.<sup>51</sup> Other assailants recognize a right of refusal and attempt to normalize the encounter by insisting that the

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relevant in law to sexual assault. In order to understand the shift in analysis that is contemplated and to appreciate the effect it will have on the handling of sexual assault cases, it is necessary to analyze and compare the current and proposed approaches to definition of sexual assault and consent in detail.

44. Clark and Lewis, *Rape*, 66-68, 140-46, 157-168; S.H. Klemmack and D.L. Klemmack, “The Social Definition of Rape,” in *Sexual Assault*, ed. Marcia J. Walker and Stanley L. Brodsky (Lexington, Mass.: Lexington Books, 1976) and the sources cited in notes 41 and 42.

45. Clark and Lewis, *Rape*, 77-108.

46. See note 44.

47. Clark and Lewis, *Rape*, 142.

48. See note 54. There remains some uncertainty in the literature as to whether victim or assailant characteristics are of equal significance as determinants of police decision-making. I suggest that neither is ignored by police or prosecutors. *Any* factor which may make it difficult to convict will weigh against proceeding with a case. Some research done on the relative weight attached by police to a range of variables associated with the victim or accused may be unreliable as a consequence of race, class, and gender bias in the researchers and the police whose decisions are studied. The research design must be adequate to eliminate the impact of bias from any of these sources.

49. Clark and Lewis, *Rape*, 100-108. And see also the work of Marshall and Barbaree, psychologists at Queen’s University in Kingston, Ontario, cited in note 42.

50. Clark and Lewis, *Rape*, 94.

51. *Ibid.*, 101.

victim *re-assure them* that the encounter is not only normal but pleasurable for, or actually desired by, the victim.<sup>52</sup>

These empirical studies reflect what appear to be widely-held social attitudes which imply that it is normal for a male to use violence in initiating a sexual transaction and that some women, by definition, *cannot be* sexually assaulted, while some men, by definition, *are not* assailants.<sup>53</sup> It appears that some social situations and relationships are believed to be, in effect, "rape-proof." These same attitudes affect every decision-making point in the criminal justice process,<sup>54</sup> often starting with the victim's own identification of an assault as something she might as well not report.

Feminist scholars and others have analysed the impact of the traditional approach to analysis of consent and sexual assault on prosecutions under rape and sexual assault provisions in jurisdictions in many different parts of the world. The results of their work point to the conclusion that when clear legal constraints are not imposed it is inevitable that issues of "fact" will be determined in accordance with the dominant social ideology of the jurisdiction. And even when legal definitions are amended to impose more precise or specific *legal* standards for the determination of a particular issue, enforcement of these standards may be seriously impeded by the attitudes of persons who exercise decision-making power in the criminal justice system. Thus Christine Boyle, for example, contemplating the probable impact of the removal of spousal immunity for rape in Canada stated:

Consequently, the question we are considering here is whether the criminal law can ever really work without some consensus in its favour. This poses a problem for a feminist analysis of the criminal law since there may be a significant body of public opinion out of sympathy with feminist aspirations: that is, rules which are counter-productive as far as the dominant male group is concerned.<sup>55</sup>

The question there was whether a widely held view that husbands have a "right" to sex with their wives would block enforcement of sexual assault provisions against husbands.

Recognition of the root problem as an ideological one is now widespread, although the terminology adopted to express the idea varies from author to author. One author argues that rape is defined by the male perspective, not the

52. *Ibid.*, 102-103, 105.

53. *Ibid.*, 91-94, 95-100.

54. L.W. Potts, "The Police and Determinants of Rape Prosecution: Decision-Making in a Nearly Decomposable System," *Police Studies* 6(4) (1983 / 4): 37-49; C.E. Silverberg, "Police Processing of Rape Complainants: Legal Constraints or Extra-Legal Bias," (Unpublished Master's Thesis, University of Toronto, 1983); G. D. Lafree, "Determinants of Police, Prosecution and Court Decisions in Forcible Rape Cases" (Unpublished Ph.D. Dissertation, Indiana University, 1979); see also Boyle, *Sexual Assault*, 127-132; Clark and Lewis, *Rape*, 58-59; Lucinda Vandervort, "Enforcing the Sexual Assault Laws: An Agenda for Action," *Resources for Feminist Research* 13(4) (1985-86): 44.

55. Boyle, "Married Women," 199.

female perspective; thus enforcement of rape law only replicates the female experience of everyday life which normalizes all oppression that serves male interests.<sup>56</sup> Another author, finding the impact of the new Michigan rape laws to be less than had been anticipated, suggested that residual resistance to the redefinition of rape was a consequence of the fact that an expansion of the situations to which the label was to apply involved “messing with the folkways.”<sup>57</sup> She predicted that only as clear legal limits were imposed on the exercise of discretion would any significant change be seen. Writing from a conflict perspective, a third author has stated: “whether an act is defined as rape depends on a set of social constructions beginning with a victim’s own assessment, and sequentially involves an entire network of social control agents.”<sup>58</sup>

Processing a rape case in the criminal justice system is thus, in practice, not primarily a matter of applying legal definitions incorporating “objective,” observer neutral tests, but of confirming the “authenticity” of one of a number of competing views of reality; a legal label is then appended to this social construction. Several other researchers all say, in effect, “reality depends on who is talking.”<sup>59</sup> Norms, values, interests, and experience shape our perception of facts.<sup>60</sup>

Recognition that social beliefs are a crucial factor in the decision that the label “rape” should or should not be applied led Jocelyne Scutt to argue that simple substitution of a negligence or reasonableness standard for a subjective standard permitting a defence of honest mistake of fact would result in little real change in the enforcement of rape laws:

The contention of those backing inclusion of a reasonableness standard is that male views of female sexuality predominate: that the predominant view in current society is that, a woman says *no* when she means *yes*, that wearing short skirts, hitchhiking, drinking too much, all signify a willingness on the part of a woman to partake of sexual intercourse — she asked for it, and that these views should be eliminated. However, these are the very standards that may be incorporated into any judgment by a jury on the basis of

56. MacKinnon, “Feminism, Marxism, Method and the State,” 635.

57. Marsh, Geist, and Kaplan, *Rape and the Limits of Law Reform*, 107, alluding to Sumner’s observation that “Stateways cannot change Folkways.”

58. Lafree, “Determinants,” 11.

59. Shotland and Goodstein, “Just Because She Does not Want to;” Johnson, “On the Prevalence of Rape;” Tamar Pitch, “Critical Criminology, the Construction of Social Problems and the Question of Rape,” *International Journal of Sociology of Law* 13 (1985): 35.

60. Pitch, “Critical Criminology;” Ottley and Zorn, “Criminal Law in Papua New Guinea;” Boyle, Bertrand, Lacerte-Lamontagne and Shamai, *A Feminist Review of Criminal Law*; Clark, “Politics and Law;” David Kairys, *The Politics of Law: A Progressive Critique* (New York: Pantheon Books, 1982); Ericson and Voumvakis, *News Accounts of Attacks on Women*; Baril, Cousineau and Gravel, “Quand les Femmes sont Victimes;” and Dolores A. Donovan and Stephanie M. Wildman, “Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defence and Provocation,” *Loyola of Los Angeles Law Review* 14 (1981): 435. See as well the writings of the legal realists and those contemporary writers who recognize that the interpretation and application of rules and the process of legal reasoning are dependant on the norms, values, interests, and experience of the decision-makers.

reasonableness; thus inclusion of an honest *and* reasonable standard, rather than just an honest standard, would not seem to alter the social beliefs predominating in our culture, and would seem to avail nothing. It would appear, therefore, that rather than objecting to inclusion in legislation of the common law position that no man can be convicted of rape unless he intended to have sexual intercourse without consent of the victim, or was reckless thereto, the better approach would be to tackle those social problems underlying misconceptions of female roles and misconceptions of female sexuality.<sup>61</sup>

The exercise of *any* discretion left to a decision-maker, including that involved in interpreting legal norms, will be culture specific. Indeed, it will actually be sub-culture specific and in this sense "private."<sup>62</sup> Definition of reality is one mechanism whereby legal systems serve to disempower and oppress non-dominant segments of a heterogeneous population.<sup>63</sup> A "neutral" rule is no barrier whatsoever; if anything, it may facilitate discrimination by defusing pressure for "equal" application of the law. Only the effects of a legal system provide significant evidence of whether it is non-discriminatory.<sup>64</sup>

In a recent dissertation, Susan Bessmer analyses rape laws and their enforcement.<sup>65</sup> According to her, it is given that "rape laws exist in a social and legal context and cannot be understood outside that context."<sup>66</sup> As people usually think in ways congruent with their own cultures, and decision-makers (scholars included) reflect what they "know as people," the case law inevitably reflects cultural norms and values.<sup>67</sup> As enforced, rape laws do not, she finds, affirm a woman's right to make decisions about her sexual contacts, but only protect against unwanted sexual contact of *types* that are not socially approved (i.e., are not in accord with patriarchal values).<sup>68</sup> She finds that scholars have neglected examination of the purposes of rape laws and have "tended to ignore the question of prejudices in fact finding. This is not surprising given the overriding concern with rules and reasoning in legal decisions."<sup>69</sup>

61. See Jocelyne A. Scutt, "The Australian Aftermath of *D.P.P. v. Morgan*," *Chitty's Law Journal* 25 (1977): 289, 296-97, as quoted and cited by Stuart, "Pappajohn," 356.

62. See authors cited in note 60; Amy Eppler, "Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Will not?" *Yale Law Journal* 95 (1986): 788; Olsen, "Statutory Rape."

63. Wriggins, "Rape, Racism and the Law."

64. See Olsen, "Statutory Rape" and Eppler, "Battered Women." Both recognize this and argue in favour of scrutiny of the results of rules as applied rather than merely of the rules themselves. The barriers seen in the United States to scrutiny of the discriminatory effect of laws in the absence of an intent to discriminate (see *Washington v. Davis*, 426 U.S. 229 (1976), discussed by Eppler) do not exist in Canada. See *R. v. Big M Drug Mart Ltd.* (1985), 18 C.C.C. (3d) 385 (S.C.C.).

65. Bessmer, *The Laws of Rape* (dissertation; unpublished). This work and the views contained in it are, as yet, not referred to in the literature and for that reason are described in more detail than other equally valuable sources.

66. *Ibid.*, 31.

67. *Ibid.*, 31-39.

68. *Ibid.*, 64-93.

69. *Ibid.*, 103.

Legal rules perpetuate social attitudes and thus are themselves agents of socialization which ordinarily escape examination.<sup>70</sup> Findings of fact and empirical generalizations, such as statements about normal or natural female behaviour, are structured by cultural norms, socially learned attitudes.<sup>71</sup> By means of a painstaking analysis of cases, Susan Bessmer argues that underlying attitudes — assumptions about what is and preferences about what ought to be (ideology) — encapsulated in the rules almost dictate that the actual effect of rape laws will be to extend a very limited negative right to women, at most “freedom from” forced sexual contact, not an affirmative right.<sup>72</sup> Her goal, shared by feminist and liberationist thinkers in general, is the development of a norm of affirmative freedom, which is not, she notes, supplied by the ideology of a possessive market economy that is content simply to prohibit interference.<sup>73</sup>

Susan Bessmer recognizes that this goal cannot be achieved by legal rules alone, and predicts that it cannot be achieved by legal rules at all until “images of assault and battery” replace “images of normal sexuality” as “the cognitive map for understanding the cases.”<sup>74</sup> It is argued below that it is actually the “images of normal sexuality” which must be altered. One effect of this will be to eliminate the present inclusion of images of assault and battery among the images of normal sexuality.

Susan Bessmer does not tell us how to change cognitive maps. But if the key to creating social change that will reflect itself in the case law is the cognitive map decision-makers apply, then changing legal rules appears to be often far less crucial than changing the way we think about the rules and apply them. And that, of course, is one way to describe the approach adopted in this article. Although Susan Bessmer does not espouse that approach in so many words, and she does not entertain the particular line I adopt (focusing on mistakes of law and the distinction between law and fact), there appears to be little question that the diagnosis of the underlying problem is a shared one. The traditional approach to rape and sexual assault cases leaves most of the crucial decisions to be determined by the world view supplied by dominant social attitudes, myth, and custom not by law. Thus, social attitudes cause not only the problem itself rape and sexual assault but also ensure that the legal system will fail to effectively enforce its own laws.

Susan Bessmer’s analysis tends to confirm the proposition in the introduction to this article — if the criminal law is to be used as a tool to protect the right of the individual to self-determination in sexual relationships, that law must be interpreted and applied in a manner that excludes all defences based on attitudes, beliefs, and norms that are inconsistent with that right.<sup>75</sup> To implement this approach we must examine the traditional approach to analysis of consent and sexual assault to see where and how attitudes, beliefs, and norms appear that are inconsistent with the right of sexual self-determination.

70. *Ibid.*, 166-67.

71. *Ibid.*, 175.

72. *Ibid.*, 349-372.

73. *Ibid.*, 360-65.

74. *Ibid.*, 227-236.

75. See text at note 13.

It is submitted that the results of the empirical studies<sup>76</sup> of rape, sexual assault, victims, assailants, and the over-all pattern of response by the criminal justice system, clearly demonstrate that when the question of the applicability of section 244 of the Criminal Code and the label "sexual assault" is approached initially through scrutiny of the assailant's behaviour measured against a social definition, many cases are screened out as unfounded without any reference whatsoever to the issue of consent. Consent is not generally identified as an issue if the level of violence is seen as normal given the relationship of the parties and other situational factors: it is not extreme enough to attract the label rape, the victim lacks credibility, or the assailant can rely on his socio-economic status to challenge the applicability of the label "sex offender." Reliance on social definitions of sexual assault to determine whether an offence has occurred displaces the legal definition of sexual assault from its role in the regulation of interpersonal relationships by the criminal law.

This practice provides a good example of how choices in administration of the criminal law can alter the actual effect of a specific prohibition. If the purpose of section 244 is simply to set a legal limit on the type and level of force that can be used in "negotiating" a sexual transaction, and to penalize some of those assailants who exceed that limit with respect to certain victims, this approach is satisfactory. If the purpose is instead, as it is submitted it is, to protect each individual's right to self-determination in sexual relationships, then an alternate approach to interpretation of section 244 must be found. The approach adopted must be one that gives initial priority to the presence or absence of consent in determining whether an assault occurred. And this, after all, is surely no more and no less than what is required by a strict reading of section 244(1)(a). The approach proposed here merely requires that legal definitions of the key elements of section 244, rather than popular myths, be used to determine when a sexual assault has occurred.

But this proposal is not free of problems either. Consent and assault are reciprocal concepts under section 244. The limits of the one ultimately define the other, no matter which you start with, as long as you remain within *one* frame of analysis. In addition, here we must work with two frames of reference: legal and social. Even if the question of the applicability of the legal definition of sexual assault to a particular sexual transaction is approached initially through analysis of the implications of the legal definition of consent to determine whether the *actus reus* of the offence has been established, the factors that are critical to the *social* definition of sexual assault still will be relevant to determine whether an individual accused is criminally responsible in at least some cases — those in which a mistake of fact defence is relied on to negative *mens rea*. How the distinction between mistakes of law and fact is made determines in what proportion of cases mistake of fact can be relied on to negative *mens rea*. In those cases in which a mistake of fact defence is not barred as a consequence of classification of the mistake as a mistake of law, the determination of criminal responsibility *will* reflect social definitions of sexual assault; these definitions will be used by the judge and jury in their assessments

76. See studies cited in notes 41, 42, 44, and 54.



of whether the accused might have believed the sexual transaction was consensual as a matter of fact.

The distinction between mistakes of law and fact in effect determines which cases are to be decided on the basis of community standards and which are to be decided as a matter of law. The distinction can be seen as a device for sorting mistakes into two classes: those absolutely prohibited and those one is permitted to make as long as the mistake is an honest one. The relevance of social definitions of sexual assault is thus restricted. Only when the mistake is a mistake of fact and thus can be relied on to negative *mens rea* do social definitions of sexual assault have a bearing on the outcome of a case. This is precisely why treatment of the mistake of law issue is of such potential significance if enforcement of the sexual assault provisions is to provide effective protection for individual self-determination in sexual transactions. If excuses that are ultimately based on lack of awareness that a sexual transaction is assaultive in law are not barred, social definitions of sexual assault (community norms based on myth rather than *legal norms* of conduct) will continue to be relied on as the basis for an honest and often purportedly reasonable belief that the alleged assaultive conduct was not wrongful. That is "rule by myth and custom" not "rule by law."

#### *Consent as a Voluntary Social Act*

Before dealing in detail with the implications of mistake of law for determinations of criminal responsibility in offences of sexual assault (i.e., the implications of mistake of law for determining whether there was *mens rea*) it is necessary to clarify the relevance of the *legal* definition of consent and *social* definitions of sexual assault to proof of the *actus reus*<sup>77</sup> of the offence of sexual assault. It is submitted that in most cases current social definitions of sexual assault, as such, have *no relevance at all* for this particular issue, because the questions of fact that arise in connection with the legal definition of consent are different from those that are the focus of current social definitions of sexual assault.

Section 244(3) constricts the interpretations available at law on the question of consent by providing that when threats, force, fear, or the exercise of authority are considered to have caused submission or failure to resist, complainant compliance *may not, as a matter of law*, be interpreted as indicative of consent. Other than this restriction, section 244 provides no explicit guidance for the trier of fact with respect to the determination of consent. The traditional approach has been to treat consent as a matter of fact in all of those cases in which consent was not vitiated as a matter of law as a consequence of interference with voluntariness.<sup>78</sup>

The result has been that the trier of fact has been required to supply a matrix or framework from common knowledge and personal experience for

77. For a useful overview of the issues relevant to the *actus reus* and review of the caselaw under the previous law, see Boyle, *Sexual Assault*, 54-75.

78. When the initial question is whether consent is vitiated in law, the use of force, threats, or fear and the causal relationship between these and the complainant's consent or submission are questions of fact to be proven beyond a reasonable doubt.

interpretation of the significance of the complainant's verbal and non-verbal behaviour in the circumstances. Jury instructions do not assist the trier of fact with these issues.<sup>79</sup> Only when coercion of a type recognized under section 244(3) is found to have been the effective cause of the complainant's behaviour are *legal* guidelines supplied to exclude consent as a matter of law. Common sense and folk wisdom, myth and custom, have provided the guidelines for determination of the issue of consent in all other cases. The consequences of the traditional approach to determining whether the complainant consented are clear,<sup>80</sup> whether the focus is, as it is here, on section 244 of the Criminal Code or on rape and sexual assault provisions in other jurisdictions that adopt a similar structure in definition of the offence. By contrast, the approach proposed in this article requires that the determination on the consent issue strictly reflect the legal definitions of voluntariness and agreement, and that facts that are not specifically relevant in law to these two issues be disregarded.

In law, whether a sexual encounter was a sexual assault depends on whether there was valid consent<sup>81</sup> or voluntary agreement to the encounter by the complainant. This must be determined by reference to the law of consent and requires scrutiny of the verbal and non-verbal behaviour of the complainant, and of the social situation in which that behaviour occurred. The behaviour of the accused is a crucial aspect of that social situation. Insofar as objective tests and standards that reflect social and linguistic conventions are used to determine what, if anything, was actually communicated to an accused by a complainant with respect to the issue of consent, the tests must be ones that focus on questions of fact related to the legal definitions of voluntariness and agreement, not questions of fact posed within the frame of reference provided by social definitions of sexual assault i.e., each decision-maker's favorite rape myth.

It could be argued that the ultimate referent of the word consent is a mental event and that consent as such exists, if anywhere, only in the mind of a person. Direct observation of a person's state of mind is impossible. To form an opinion about another person's state of mind, we observe the person's verbal and non-verbal behaviour and then interpret the state of mind by means of inferences about the significance of what we have observed. This process,

79. See, for example, the following excerpt from the instructions with respect to consent by the judge at trial quoted by Dunn, L. J., in the reasons on appeal in *R. v. Olugboja*, [1981] 3 All E.R. 443, 445 (C.C.A.): "The question of consent is a question of fact for you to decide, approaching it in a commonsense way. You are concerned, are you not, with the field of human sexual behaviour and in particular in this case teenage sexual behaviour? You have to consider it in a commonsense way of applying your own experience or knowledge of human nature and your knowledge of the ways of the world." See also the instructions in *R. v. Hindle* (1978), 39 C.C.C. (2d) 529 (B.C.C.A.) and the definitions of consent quoted in notes 39 and 40.

Empirical studies of the attitudes of male as opposed to female jurors as expressed in their responses to rape and sexual assault cases have shown mixed results. Commonsense would suggest that with both groups education and prior experience should be more significant than gender. It remains true however, that some women may find abandonment of the traditional beliefs represented by rape myths too threatening to be tolerable insofar as to relinquish these beliefs enhances their awareness of being *personally* vulnerable.

80. See text at notes 41-74.

81. There is no definition of consent as such in the Criminal Code. Therefore we may assume the term has its ordinary legal meaning of *voluntary agreement*. See notes 39 and 40.

difficult and often of dubious validity, is familiar; it is the one used when state of mind is relevant to proof of the liability of an accused to be convicted for an offence. But the complainant's state of mind (including attitude and motive) is relevant to the *actus reus* of sexual assault only if there is some doubt that consent was voluntary. Otherwise, we are concerned with consent as a social act, an act of communication between persons in the social world, and not the thoughts and mental state of the person who gives consent. For in the ordinary and unproblematic case the person who consents is assumed to "say what they mean." All else being equal, we simply assume that agreement (or refusal) is voluntary and reflects the speaker's (more or less) deliberate choice. We further assume that a choice usually reflects the wishes, desires, or preferences of the person making the choice even if the choice actually made is ill-considered or accompanied by ambivalence.

The social act of consent consists of communication to another person, by means of verbal and non-verbal behaviour, of permission to perform one or more acts which that person would otherwise have a legal or non-legal obligation not to perform. Consenting, like promising, is thus performative,<sup>82</sup> a behaviour that has normative consequences. To consent is to waive a right and relieve another person of a correlative duty. Consent thus alters the rights and duties between the persons who are parties to an agreement created by communication. When the rights and duties in question are not merely conventional or ethical ones, but are legal rights and duties, consent is an act that has specific legal consequences. The only conditions are that it be voluntary and knowing or informed, that is, freely given with reference to some general or specific concrete objective or content.

When the permission given by consent is explicit, or otherwise clear and unequivocal, and there is no reason to question the validity of the consent, the person to whom the consent was given may rely on the consent as constituting the waiver of a right. Acts performed in reliance on such a waiver do not breach any operative legal duty and do not constitute commission of an offence.<sup>83</sup> It is thus clear that any analysis of consent must consider what, if anything, was actually communicated, as well as whether the communication was voluntary. We need to know what verbal and non-verbal behaviours constitute communication of consent in the context of a sexual transaction, and how the voluntariness of the communication is to be assessed in those cases when the voluntariness of an otherwise effective consent is in question. The only questions of fact that are relevant to the *actus reus* of sexual assault are ones that are relevant to these two issues.

82. I am indebted to Nathan Brett, Philosophy, Dalhousie University for pointing out the aptness of the term "performative" to describe consent viewed as a social act. See his unpublished paper, "Consent" (1986). See also "Consent, Assault and Sexual Assault," (1987) an unpublished paper by Brenda Baker, Philosophy, University of Calgary, in which Baker develops some aspects of Nathan Brett's insight as it applies in the context of sexual assault. For an introduction to analysis of "performative utterances," see J. L. Austin, *How to Do Things with Words*, The William James Lectures, Harvard University, ed. J. O. Urmson (New York: Oxford University Press, 1965).
83. Consent given in bad faith for any reason, as long as it was given voluntarily, would be as effective a waiver as consent given in good faith. A complainant, just like someone who has given an undertaking or made a promise, cannot retroactively disclaim or cancel the consent or promise after it has been relied on by another person.

*The Actus Reus of Sexual Assault*

Under section 244, the prosecution<sup>84</sup> must establish beyond a reasonable doubt that an assault occurred. This requires showing that there was an application of force, which can be as minimal as mere touching, and that there was no consent.<sup>85</sup> There may be conflicting or ambiguous evidence on the issues of consent or its validity, however. Expert evidence, if admissible, may be required on the issue of voluntariness if the trier of fact is to evaluate the actual significance of the behaviour of the complainant and the probable impact of the behaviour of the accused on the complainant in the whole of the circumstances.<sup>86</sup> Such evidence will often be essential to successful prosecution of a sexual assault case; without it the trier of fact must evaluate the significance of the evidence on the basis of common and personal knowledge alone. To imagine our hypothetical Mr. Ross or the infamous defendant in *Kimber*<sup>87</sup> sitting as a jury member is to understand why reliance by the trier of fact on personal knowledge alone could cause a prosecutor to despair of ever persuading the jury that the complainant had been assaulted, let alone coerced.

The issue of consent under section 244 of the Criminal Code may arise in a range of circumstances:

(a) Explicit consent: Voluntary agreement is expressly communicated.

(b) Implied consent: Voluntary agreement can be unequivocally inferred from the behaviour of the complainant.

(c) Vitiating consent: The circumstances in which actual or apparent, explicit or implied, consent was given, or some other fact, imply that agreement was incomplete or not fully voluntary.

(d) Implied non-consent: (1) Resistance and other behaviours inconsistent with “voluntary agreement,” refusal can be unequivocally inferred from the behaviour of the complainant; or (2) the complainant, though conscious, takes a passive role and offers neither assistance nor resistance.

(e) Explicit refusal: Refusal is expressly communicated.

84. Only in the case of summary conviction offences is section 730 applicable to place a burden of proving consent (equivalent in function in this context to lawful exception or exemption) on the accused. When the charges are indictable, section 730 has no applicability. Section 730 may be contrary to the presumption of innocence protected by section 11(d) of the Charter in any event.

85. See *R. v. Burden* (1981), 25 C.R. (3d) 283 (B.C.C.A.): A passenger on a bus placed his hand on the thigh of the person sitting next to him. They were not acquainted. In the circumstances consent was not found to be implied, and a conviction for indecent assault was entered.

86. See notes 94, 96, and 98.

87. See note 3 for the hypothetical involving “Mr. Ross.” And see *R. v. Kimber*, [1983] 3 All E.R. 316 (C.C.A.); Mr. Kimber is surely immortalized in the annals of criminal law for his comment, when asked why he had not asked the complainant to have sexual intercourse with him, that it is a “silly thing to do isn’t it, ask a woman for intercourse.”

(f) Section 244(3): Use of force causes submission or lack of resistance; no consent as a matter of law.

(g) Unconscious victim: Capacity to consent or refuse is suspended.

Explicit consent, explicit refusal, and unconsciousness present the three simplest cases. As long as explicit consent is not vitiated by the circumstances, it is clearly inconsistent with assault.<sup>88</sup> Explicit refusal is inconsistent with consent. An unconscious victim cannot and therefore clearly does not consent. The other categories of cases are less clear. Resistance and refusal imply the absence of consent. But if clear resistance fails due to insufficient physical strength, fatigue, or despair, the failure may itself be taken to imply a change of mind and consent.<sup>89</sup> In such a case interpretation of section 244(3) is of critical importance.<sup>90</sup>

### Voluntariness

Section 244(3) specifies that submission or failure to resist an assault is, as a matter of law, not consent when the submissive or non-resistant behaviour is "by reason of" threat or exercise of force against the complainant or another, fraud, or the exercise of authority. The causal relationship must be proven beyond a reasonable doubt. Submission to avoid being beaten, or beaten more severely, for example, appears to fall squarely under section 244(3).

There may be cases in which consent can be shown to have been vitiated at common law (category (c) above) even though consent has not been found to be barred as a matter of law under section 244(3). Such cases will arise unless section 244(3) is regarded as exhaustive or is construed widely. If, for example, section 244(3) is *not* exhaustive and the term "force" as it is used in section 244(3) is interpreted to *exclude* non-physical forms of coercion (social, psychological, economic, emotional), non-consent will still be at issue under section 244(1) in cases in which any of these other forms of coercion were

88. Cases may involve change, over the duration of a sexual transaction, from one category to another. Consent, once given, can be revoked, and refusal can be followed by consent. Clearly this complicates analysis of any particular transaction. Consider, for example, *R. v. Mudge*, [1930] 1 W.W.R. 193 (Sask. C.A.) in which the judge found torn clothing and bruises to be consistent with initial resistance followed by consent. And *R. v. Kaitamaki*, [1980] 1 N.Z.L.R. 59 (C.A.), a conviction for rape by omission: The accused had continued with an act of sexual intercourse in the face of clear notice of non-consent.

89. See *R. v. Deol, Gill and Randev* (1981), 58 C.C.C. (2d) 524 (Alta. C. A.) for a case involving lack of consent because the victim was unconscious. See *R. v. Mudge*, [1930] 1 W.W.R. 193 on interpretation of resistance which "fails." Struggle followed by success in completing the transaction accompanied by a reduction in the level of resistance offered by the complainant appears to be a common sequence of events and leaves the trier of fact with the problem of determining whether the reduction in resistance was caused by force, fear, or threat, or instead by consent. See *R. v. Martin* (1980), 53 C.C.C. (2d) 250 (Ont. C.A.) and *R. v. Hindle* (1978), 39 C.C.C. (2d) 529 (B.C.C.A.). In *Hindle* the judge in instructing the jury at trial stated "if the woman first resisted and then later consented to the act of intercourse because she yielded to her own passion, then this would be a genuine consent, notwithstanding the fact that she at first objected or resisted the advances made to her." 39 C.C.C. (2d), 530.

90. See note 14.

present.<sup>91</sup> Common law principles would apply to determine whether voluntariness was impaired.

Cases that require the trier of fact to decide whether consent was vitiated under section 244(3) or at common law raise some very elusive issues. In the past, the absence of clear guidelines or criteria to apply in deciding whether voluntariness was absent or impaired invited reliance on social definitions of sexual assault. Those definitions, as we saw above,<sup>92</sup> refer to social norms and are concerned primarily with the type and degree of force used by assailants. As we also saw, there is little unanimity in society as to what is “normal” sexual behaviour, or whether what may be normal statistically is always conscionable. The answer to that question depends on who you ask. Therefore, if it is agreed that the purpose of the Criminal Code provision is to protect the individual right of self-determination and physical autonomy, rather than simply to regulate the type and degree of force that may be used to obtain compliance from a victim, the point of reference must be the complainant and not social norms. Attention must be directed to the presence or absence of factors that had a coercive impact on the complainant.<sup>93</sup>

91. Christine Boyle, observing that the new sexual assault provisions do not “confront the very difficult philosophical question of the distinction between submission and consent,” suggests that although there is nothing in section 244(3) to indicate that the section contains an exhaustive list of the situations in which submission or lack of resistance will not be equivalent to “consent,” the section is open to the interpretation that it is exhaustive. Boyle, *Sexual Assault*, 59, 61. More support for my position is found in Donald Stuart’s general discussion of consent as a defence. Stuart, *Canadian Criminal Law*, 457-468. Donald Stuart states with reference to consent as a defence to assault: “[I]t is clear that the notion of duress here is far wider than the concept of duress as a defence, where the threat must be particularly serious. Since the real issue is whether the victim actually freely consented, whether threats vitiated the consent must be left to the trier of fact. On this view it is unnecessary to take a firm position that an inducement, economic or otherwise, will never suffice.” Donald Stuart cites the contrary position taken by Glanville Williams, *Textbook*, 508-510. Donald Stuart’s position on the point appears to be the same as mine, although it is not directed specifically towards interpretation of section 244(3) in the context of sexual assault. From a theoretical point of view, this position is to be preferred to an artificially truncated common law approach. Nonetheless, Christine Boyle’s uncertainty as to how section 244(3) will in fact be handled by judges in sexual assault cases is only realistic. The habit of holding the victim to the same standard as that applied to an accused who claims duress as a defence may survive repeal of the old rape laws to influence interpretation of section 244.

An alternate proposal is made by Jocelyne A. Scutt, who states: “When comparing dicta from the rape cases, it can be seen that a standard of consent to the sexual act has been set up within those boundaries set for ‘consent’ given under duress to the doing of a criminal act. It is questionable whether the standard of submitting to an act of intercourse should conform to that of undertaking to do acts offending the criminal law. Consent in rape would seem to have more logical connection with that under the law of contract.” Scutt, “Consent Versus Submission: Threats and the Element of Fear in Rape,” *University of Western Australian Law Review* 13 (1977): 52, 61. Although this proposal would represent an improvement over use of the criminal duress standard, on reflection it must be rejected as a solution to the underlying problem; to analogize between sexual assault and contract is to invite development of and reliance on a standard of “unconscionability” as the basis for determining when voluntariness is absent. The result would be: (1) to affirm rather than reject the analogy between transactions with respect to property and sex, and (2) to invoke social norms and attitudes to ascertain when the *actus reus* of sexual assault has been proven. Harris, “Towards A Consent Standard in the Law of Rape,” also rejects continued use of the duress standard but suggests the appropriate standard would resemble that used in the law of search and seizure under the United States Constitution.

92. See text at notes 44-77.

93. The court in *R. v. Olugboja*, [1981] 3 All E.R. 443 (C.C.A.), held that when consent was at issue as a question of fact for the purposes of proof of the *actus reus* of the offence of rape

Consent, when given, is given by an individual. Each individual is a person with a collection of social, cultural, and psychological experiences, needs, fears, values, and priorities. As a consequence any particular individual may be more effectively pressured and manipulated by some reinforcers (threats and rewards) than by others. Different threats or promises may be more effective in controlling other individuals. Gender, racial, social, or economic inequality may amplify the coercive impact of some forms of pressure. Two complainants may perceive an apparently identical situation differently. The right to self-determination and autonomy protected by the Criminal Code is the actual *individual's* right, not the right of some hypothetical "typical" individual. Individuals have the right to exercise self-determination in accordance with their *own* values and perceptions, not those of a mythical victim. Nor can individuals who are not acting in violation of the legal rights of other persons reasonably be required to perceive and evaluate their situation other than they do in fact. Perceptions are affected by past experiences, needs, values, and fears.

The inquiry under section 244 into the "voluntariness" of any choice therefore must focus on the impact of the whole of the assailant's behaviour on the *particular* complainant in that *specific* situation. When the validity of explicit or implied consent is at issue, the Crown must prove beyond a reasonable doubt that the complainant believed herself to be unable to escape from the coercive situation and without a meaningful opportunity to choose not to submit to, or participate in, the sexual transaction. Here, as is not the case when consent is viewed as a social act of communication, the focus is on the subjective, on the beliefs, motives, attitudes, and fears of the "consenting" individual. The conclusion about voluntariness must therefore be based on all evidence, including expert evidence,<sup>94</sup> that is relevant to understanding the state of mind of the *particular* complainant. This is the case whether the complainant is an individual who readily experiences herself as being in a situation of "moral involuntariness," or perhaps someone who, correctly or not, assumes that as

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under section 1 of the Sexual Offences Act, 1956 as amended by section 1(1) of the Sexual Offences (Amendment) Act, 1976 the trier of fact is to be "directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse, having regard to all the relevant circumstances, and in particular the events leading up to the act, and her reaction to them showing their impact on her mind." 3 All E.R., 449. On the question of law at issue in the case, the judges held that to convict the prosecution need not show that force, fear of force, or fraud vitiated consent [and caused mere submission] but only that the victim [for whatever reason] did not consent. This approach is functionally the same as that taken in the present article to the extent that it: (1) finds the key issue in the offence of rape to be whether the complainant agreed (in the affirmative sense) to the act in question, and not the type or quantum of force used; (2) recognizes that consent may or may not accompany submission and that the distinction between the two may not always be easy to make; and (3) appreciates that jury instructions should provide more assistance on the issue of consent than they typically do. But see note 103 for material indicating that the reasons in *Olugboja* are best seen as only identifying but not finally resolving problems related to determination of the issue of consent as a question of fact.

94. Massaro, "Experts, Psychology, Credibility, and Rape;" Pamela A. Wilk, "Expert Testimony on Rape Trauma Syndrome: Admissibility and Effective Use in Criminal Rape Prosecutions," *American University Law Review* 33 (1984): 385; Del Martin, *Battered Wives* (San Francisco: Glide Press, 1976); Lenore E. Walker, *The Battered Woman* (New York: Harper and Row, 1979); Sedelle Katz and Mary Ann Mazur, *Understanding the Rape Victim* (New York: Wiley, 1979); see also the materials cited in note 96.

long as she remains conscious she chooses what she does, even under adversity.<sup>95</sup>

Neither the individual who is rendered "incapable" of choice or self-determination by an assault, nor the individual who is forced to make a choice among options which are all undesirable and makes it in favour of what seems to each of them to be the lesser of two or more evils, should be deemed to have acted voluntarily merely because their responses are not what a particular trier of fact would expect from the so-called "typical" complainant.<sup>96</sup> Use of objective tests that do not reflect the particular characteristics of a specific complainant is inappropriate. This is why expert evidence may often be

95. An individual of the latter type is far less apt to label an incident as a sexual assault than is an individual of the first type. Victim response in this regard is clearly influenced by the victim's self-image and psychological needs. Some victims find it very threatening to their image of themselves as independent competent individuals to admit even to themselves alone, that for a brief period of time they were not in control of and responsible for what happened to them. These individuals may need to perceive themselves as in control and thus will tend to ignore or experience acute conflict over recognizing their powerlessness. If this response prevents the victim from perceiving an assaultive situation for what it is, the label assault will not be applied by the victim and the incident will not be reported. And see note 96 on the styles of victim response observed after the assault.

The need of individual victims to see themselves as persons in control of their life-situation can be effectively used by police and prosecutors in the process of "cooling-out the victim." A victim who claims to have maintained a measure of control over her responses in the face of a forced choice is more, not less, vulnerable to social pressures to accept all responsibility for the occurrence of the assault. See Clark and Lewis, "Victimology: The Art of Victim Blaming," in *Rape*, 147-158. The argument is seductive, particularly with victims who want to believe that gender differences are irrelevant in social relationships as well as in law. Were that true there would be less need to write this paper.

96. Sexual assault victim response patterns show wide variations between individuals. The belief that "real" victims all react during and subsequent to a sexual assault in a particular manner is false. Prior experience, personality, interpersonal and situational factors, and training in self-defence or techniques for avoidance and survival in assaultive situations will all have an effect on overt victim behavior just as they do in any assault. Even though the victim is treated "as if" she/he were an "object" in the context of the assault, the victim is in fact still a person, not an automaton, and continues to exercise some measure of control over his/her behavior.

A review of the cases cited in note 16 demonstrates that passivity in a victim is far less rare than might be assumed. And see Katz and Mazur, *Understanding the Rape Victim*, 179-182, reviewing the results of a number of studies that found passivity and failure to resist indicates "profound primal terror" or "frozen fright," not consent. Such a victim may describe the assaultive events as if they happened to someone else while she (as agent) was removed from her body. See Resnick, "The Trauma of Rape and the Criminal Justice System," 52-54; see also Walker, *Battered Woman*, 124.

Burgess and Holmstrom, "Rape Trauma Syndrome," found all victims in about equal numbers had one of two "styles" of response — "expressed" or "controlled" in the period immediately after the assault. The first group used crying, sobbing, smiling, or acting restless or tense, to express fear, anger, and anxiety. Those victims who were controlled hid their feelings and appeared calm. See also Clark and Lewis, *Rape*, 90-91.

Studies of the long-term effects of sexual assault are only gradually becoming available. See Thomas W. McCahill, Linda C. Meyer, and Arthur M. Fischman, *The Aftermath of Rape* (Lexington, Mass.: Lexington Books, 1979); Boyle, *Sexual Assault*, 179-180, calling for Canadian research on this issue; see also Lynda Lytle Holmstrom and Ann Wolbert Burgess, *The Victim of Rape: Institutional Reactions* (New York: Wiley, 1978); J.A. Libow and D.W. Doty, "An Exploratory Approach to Self-Blame and Self-Derogation by Rape Victims," *American Journal of Orthopsychiatry* 49(4) (1979): 670; M.P. Koss, "The Scope of Rape: Implications for the Clinical Treatment of Victims," *The Clinical Psychologist* 36(4) (1983): 88-91; D.G. Kilpatrick, L.A. Veronen, and P.A. Resnick, "The Aftermath of Rape: Recent Empirical Findings," *American Journal of Orthopsychiatry* 49(4) (1979): 658; D.G. Kilpatrick, P.A. Resnick, and L.A. Veronen, "Effects of Rape Experience: A Longitudinal Study," *Journal of Social Issues* 37(4) (1981): 105. See also the studies discussed in Massaro, "Experts, Psychology, Credibility, and Rape," 425-432.



essential to effective prosecution of a sexual assault case. Voluntariness is a subjective issue,<sup>97</sup> but objective tests, appropriately formulated to encompass the factors relevant to a particular complainant, can be of considerable assistance to the trier of fact who must decide whether consent was voluntary.<sup>98</sup>

### Submission and Implied Consent

It might be assumed that implied consent (category (b) above) includes those cases in which the complainant was conscious and there was neither explicit consent nor an explicit or implied refusal, and no factors were present which would vitiate consent under either section 244(3) or at common law. But if this approach, which treats implied consent as a residual class, is followed in cases in which the facts are ambiguous, dismissal of those cases would be required even though "implied consent" could not be affirmatively established on the evidence. Consent would be presumed unless the complainant was shown to have actively resisted in some way. That approach does not provide effective protection against non-consensual sexual contact. Implied non-consent (category (d) above), rather than implied consent, must instead function as the residual category which includes all cases in which the complainant did not give explicit consent and took a passive role or the evidence on the consent issue is ambiguous. Implied non-consent thus must include all those cases in which the complainant was conscious and there was neither valid explicit or implied consent, nor explicit refusal.<sup>99</sup>

Section 244(3), as noted above, simply designates certain circumstances as ones that exclude consent as a matter of law. This leaves the trier of fact to decide whether the complainant can be considered to have consented in all other cases. By adopting this approach to consent (a codification of the rule seen in *Firkins and Plummer*<sup>100</sup>), the Criminal Code may appear to tacitly suggest that as long as the factors enumerated in section 244(3) are absent or, if present, are not found to be the effective cause of compliant behaviours, compliance may be evidence of consent. This interpretation invites use of traditional objective tests that focus on force and resistance, rather than the

97. The assertion that the inquiry into voluntariness must be subjective is based on the premise that the criminal law seeks to protect the individual right of self-determination and physical autonomy rather than the right of the average person in this society to self-determination and physical autonomy. If the goal adopted was protection of the right of the "average" person, then objective tests, believed to reflect the conditions under which there was no reason to believe voluntariness of choice by the average person had been infringed, could be adopted. But that approach, which is not unlike the approach proposed by Jocelyne Scutt ("Fear in Rape"), would prohibit and penalise only certain types of conduct and therefore would abandon victims who are not "average" to suffer harm without the protection of criminal law. *In a society as culturally, ethically, and experientially diverse as Canadian society is, to adopt objective tests for voluntariness constitutes a failure to extend actual and effective equal protection by the criminal law to all persons.*

98. The objective tests formulated by a trier of fact on the basis of personal commonsense only reflect the life-experience of that particular trier of fact. An expert witness, who has clinical experience and a working knowledge of the results of empirical research studies, can assist the trier of fact in formulating objective tests that take account of the particular factors and circumstances in the case at hand that may be outside the experience of the trier of fact.

99. See notes 104-105 and accompanying text.

100. *R. v. Firkins* (1977), 37 C.C.C. (2d) 227 (B.C.C.A.); *R. v. Plummer and Brown* (1975), 24 C.C.C. (2d) 497 (Ont. C.A.).

approach proposed above,<sup>101</sup> to assess whether there was consent and whether it was valid at common law under section 244(1).

Thus in a case in which there is "submission" or "failure to resist," and yet section 244(3) is *not* found to apply and voluntariness is *not* found to be vitiated at common law under section 244(1), compliance, apparent acquiescence, or passivity could be made a basis for inferring consent, just as it has been traditionally.<sup>102</sup> The effect would be to continue an approach to the determination of consent that regards the issue of consent to be exhausted by the failure to establish an absence of voluntariness. In that approach if it is not found using traditionally formulated objective tests that the complainant's capacity to exercise choice was suspended or that compliance was extorted (i.e., obtained by the use of influence that is deemed "criminal" in the circumstances), whatever occurred is presumed to have been with consent.

This approach merely serves to affirm dominant social norms governing propriety in the negotiation of sexual transactions. It accords no recognition at all for analytic purposes to the social act of consent that functions as a performative to alter rights and duties between the parties or to the element of "mutuality of assent" that is implied by the term "agreement." Instead the bare failure to find active interference with "voluntariness" is taken as conclusive on the issue of agreement as a matter of law, and thus consent as a matter of fact flows from failure to find the force or influence used criminal. There is no recognition of the complainant (typically female) as a participant in making an "agreement" about what, if any, sexual transaction shall occur. Nor is there recognition of consent as a performative, a social *act* of communication with normative consequences. The complainant is thus restricted to a merely reactive role and is not recognized as an agent in any proper sense.

As Christine Boyle notes and as we saw above, the case law under the previous rape laws provides little guidance with respect to implied consent and the new sexual assault provisions do not "confront the difficult philosophical question of the distinction between consent and submission."<sup>103</sup> The focus in the past has been on evidence of physical resistance by the complainant. Failure to resist in the manner and to the extent believed to be normal in a rape was taken to be indicative of consent. The shift in emphasis obtained by distinguishing "*consent*" as a social act whereby an agent confers permission on another person, and thus communicates waiver of a legal right to the extent indicated by the permission, from "*submission*" as an observable physical behaviour is significant. Once the distinction is recognized it should be clear that verbal communication by the complainant is the most reliable indicator whether this person, an independent human agent, chooses to waive his or her legal right of physical autonomy. In the traditional approach the focus was on the complainant's body. The only question was whether it had sustained enough damage (torn clothing, bruises, broken bones, internal injuries perhaps) to

101. See text at notes 92-98.

102. See also notes 91 and 93 and accompanying text. Of particular interest is the discussion of this problem in the reasons for judgment in *R. v. Olugboja*, [1981] 3 All E.R. 443 (C.C.A.).

103. See Boyle, *Sexual Assault*, 71, 61. The "Comment" on *R. v. Olugboja*, [1981] 3 All E.R. 443 (C.C.A.) by Eira Caryl-Thomas, *Criminal Law Review* (1981): 718, illustrates the confusion over the distinction between consent and submission.

render the assertion that the complainant did not consent credible. Once consent is viewed instead as the act of an agent, of a person who is the bearer of certain rights, all non-verbal behaviours are suddenly of secondary significance, at best, and relevant only insofar as they constitute alternate modes of communication by the person-complainant.

### Unequivocal Communication

It is submitted that if non-verbal behaviours must be assessed as alternate forms of communication of a person's consent or refusal to participate in a specific sexual transaction, then they must also be unequivocal if such communication is to function, for the purposes of section 244, as a substitute for explicit verbal consent or refusal. Non-verbal forms of communication are most apt to be at issue primarily in three categories of sexual transactions:

- (1) Those involving partners in an established sexual relationship.
- (2) Those involving persons one or both of whom are timid or shy in the overt discussion of sex in general or specific sexual transactions in particular.
- (3) All transactions in which facial expressions and gestures are substituted for verbal communication.

The third non-verbal form of communication includes those involving ambiguous or contradictory messages alleged by the defence to have communicated "consent," and by the prosecution to have communicated at most refusal and at least indecision.

Some cases would fit within more than one of these three descriptions. The difficulties of analysis would be compounded by any imbalance of effective power between the two partners as a consequence of socialization and socio-economic factors. Such inequality could interfere with voluntariness but, equally important in this connection, might also inhibit or frustrate honest, direct, and effective communication.<sup>104</sup>

104. On the difficulties of effective communication about sexual interest or lack thereof, see Bessmer, *Laws of Rape* and Weiner, "Shifting the Communication Burden." See also *Trottier v. R.* (1981), 58 C.C.C. (2d), 297 and the reference by Dickson, J., (as he then was) in *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, to the Heilbron Report on the difficulties each party may have in interpreting a sexual situation. See also Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982), chapters 5 and 6 and the studies cited therein, for example. Carol Gilligan found that many women often demonstrate concern for others and the feelings of others even when it requires them to equivocate to the point of being dishonest about their opinions and feelings about other people. (Insofar as this occurs it clearly interferes with effective communication.) She makes a strong case for the conclusion that on the average, young women in this culture have an ethic of responsibility towards others and avoidance of selfishness that encourages self-denying and sometimes self-sacrificing behaviours. (It is clear that such an ethic may render women vulnerable to "exploitation" and "self-destructive" choices if they live in a patriarchal society in which self-interest and prudence in pursuit of self-interest are the

It is clear, however, that in the absence of explicit verbal consent or refusal, no matter what the allegations and circumstances happen to be, the critical issue will always be whether there was implied consent that was unequivocal. It is submitted that anything less than unequivocal implied consent points to the conclusion that the transaction was assaultive within the meaning of section 244. Sexual touching in the absence of either explicit verbal consent or unequivocal implied consent *is* sexual touching "without consent" as specified by section 244. Thus the categories other than (a) and (b) above<sup>105</sup> are of

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dominant norms.) Carol Gilligan found that maturation (a question of experience, not age alone) leads to the development by women of understanding that responsibility extends to care for the self as well, but moral issues continue to be analyzed by women with reference to the effects of choices on persons and relationships. Although it must be remembered that she studied the consequences of female socialization during the preceding 25 years or so only, the results do suggest that male and female points of view may differ in significant ways that do have implications for the analysis of relationships and interaction between males and females, including their attempts to communicate. Assume, for example, that the accused claims to have relied on what he terms coy and flirtatious behaviour as a basis for implying consent, and asks the trier of fact to agree and find that the *actus reus* has not been established. The complainant alleges that this is wishful thinking on the part of the accused; that her behaviour prior to the assault was merely pleasant and considerate towards the accused whom she regarded as a pompous and highly insecure person. Here there does appear to be a communication problem. It is submitted that the law must be structured and interpreted so that the risks generated by such a communication gap are not permitted to defeat the complainant's right of physical autonomy. It should not be necessary for complainants to announce on a bull-horn — "Just because I am civil to you does not mean that I consent to sexual intercourse with you, nor does it indicate that I 'really' want to even though I told you No."

Communication may be made more difficult, ironically, as women respond to sexual assault with pro-active rather than re-active behaviours. Some women, for example, may now deal with rape situations with tactics developed to defuse rather than intensify the level of violence used by an assailant. A woman who recognizes that rape is an act of social and physical domination, not a sexual act, may choose to avoid all behaviours that are stereo-typical victim behaviours in the hope of convincing the assailant that she is not his fantasy victim. Mr. Ross's victim is an example. The assumption is that many typical fantasies involve a struggle with a distraught, semi-hysterical woman whose objections can be dismissed as "silly" or with a comment like — "you're so cute when you're angry." Anti-rape tactics (when flight is impossible) therefore include extreme boredom, matronly disapproval, and plain old passivity. These responses may be seen to indicate acquiescence to an assailant who does not know that the law requires consent in the affirmative sense, not simply "submission."

105. Because the approach proposed in this article is a new one, there is, as is to be expected, no direct authority for it as such. Were that to be a prerequisite for all academic writing, academic writing would be limited to the description and analysis of existing law and previously decided cases.

The two sources of authority in partial support of the approach proposed in this article are *R. v. Olugbuja*, [1981] 3 All E.R. 443 (C.C.A.) (see notes 79, 93, 102, and 103), and the dissenting reasons by Jacques, J. (*ad hoc*) in *R. v. Bresse, Vallieres and Theberge* (1978), 48 C.C.C. (2d) 78, 88-96. Jacques, J. defines "consent" as follows: "Consent is an operation of reason which includes the apprehension of a factual situation, deliberation, a free and voluntary adherence and, finally, communication of this adherence for in the province of law, a consent must be communicated to have any value whatever." 48 C.C.C. (2d), 91.

Equivocal communication of consent cannot, Jacques, J., holds, be relied on to ground a mistake of fact by the accused, for to act in these circumstances is reckless and thus indicates *mens rea*, not a defence. It might appear that Jacques, J., is using the approach proposed in this article in full. But on closer examination it is clear that the line of reasoning he follows to arrive at the conclusion that a mistake of fact defence is unavailable to the accused on these facts is quite different from that proposed in this article. Jacques, J., appears to have been satisfied that the accused were aware of complainant behaviours that were inconsistent with consent and therefore, a properly instructed jury could not have found that the accused did not advert to the possibility of non-consent or that they honestly believed that consent had

analytic significance with respect to the *actus reus* of sexual assault because they are inconsistent with consent. When they are present the trier of fact cannot conclude that there was either unequivocal implied consent or explicit consent that was not suspect.

The right of the individual to be free of non-consensual sexual contact will be protected only if consent is interpreted as an absolute issue, such that a failure to find that it was present is taken to demonstrate that it was absent. The issue here after all, under a strict interpretation of section 244, is whether the complainant agreed voluntarily to the transaction. If she *did* agree, then it is clearly not also the case that maybe she did not agree. But if she did not agree, then it cannot at the same time be the case that maybe she did agree. *The law provides that sexual touching is assaultive unless the person touched agrees to be touched. It does not provide that the transaction is non-assaultive unless the person touched objects.*

Constitutional standards require that the accused be presumed innocent until proven guilty according to law. The Crown is required to prove all elements of the *actus reus* beyond a reasonable doubt. Thus although the issue remains simply — was there consent or not? — to convict, the Crown must still prove the absence of consent beyond a reasonable doubt and this may appear to require proof of a negative fact. What is proposed here is simply that proof beyond a reasonable doubt of any of the following is sufficient on the issue of consent as it arises in connection with the *actus reus* of sexual assault:

- (1) the complainant either explicitly or impliedly refused to agree to the transaction; *or*
- (2) the complainant neither explicitly agreed *nor* implicitly agreed in a manner that was unequivocal; *or*,
- (3) the circumstances invalidated any consent, explicit or implied.

Any one of these three alternatives supplies what is required with respect to consent to establish the *actus reus* under section 244(1). Evidence of complainant behaviours that are arguably equivocal when measured by community mores, or any other standard, simply confirms that interpretation of

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been given. It was on this basis that Jacques, J., unlike the other members of the panel, rejected, as a ground for appeal, the trial judge's decision not to leave the defence of mistake of fact with respect to consent to the jury.

It is clear, however, with respect, that withholding a defence of mistake of fact from the jury in such circumstances is neither the proper nor the most effective way to achieve general recognition for a strict definition of consent. It is far better, I argue, to arrive at the same result by barring consideration of mistake of fact in law in all cases in which it is actually a mistake of law and to admit the defence of mistake of fact would only serve to displace the legal definition of consent from its role in determining when the accused is liable to be convicted. This is the function of the mistake of law rule to be applied to bar reliance on an excuse to negative *mens rea* by an accused who is ignorant of the law, or misinterprets or misapplies the law.

communicative behaviour *is a complex process*. Evidence of equivocal complainant behaviours will assist the prosecution, but clearly not the defence.

### Consent in Fact, Not Myth

Now that consent as a question of law has been clarified, it should be clear that the questions of fact that are relevant to the *actus reus* of sexual assault are different from those that are the focus of current social definitions of sexual assault. What the complainant said (“Yes”/“No,” “Come here”/“Get away from me,” “Do that some more”/“Leave me alone,” “Please touch me”/“Do not touch me”), is relevant. Physical resistance without hysteria, or gestures indicating refusal or the rejection of sexual overtures, though they are the common ingredients of rape myths which suggest that women always put up a show of resistance though they really want sex, do not constitute unequivocal implied consent but rather the opposite. Demographic features descriptive of the complainant and the assailant (age, income-level, social status, occupation, marital status, etc.), the relationship between the complainant and the accused (employee-employer, friend, acquaintance, relative, etc.), the activity the complainant was engaged in, and the place where she (or he) was at the time of the alleged assault have no direct relevance for establishing what was communicated with respect to consent.

Social and situational factors must be considered, however, when deciding whether it is appropriate, given the social situation in which the parties found themselves, to find the verbal and non-verbal behaviours of the complainant to have been voluntary. For example, as long as the social situation is free of coercive factors, to nod the head in response to a question seeking permission to engage in sexual behaviour is to communicate permission. That gesture nodding the head has a clear significance in this culture by convention. Yet, using the same example, if the complainant nodded her head in response to a request for permission in circumstances that were coercive (the assailant had a weapon, or was accompanied by four big men, or had threatened to use his authority or social position to harm her social or economic interests or those of persons whom she cared about or felt responsible for, or had suggested that she had “better be nice to him or else”), it will be the social and situational factors, amplified in some cases by gender and racial inequality, the impact of female socialization, and the personal history of a particular complainant, that will determine whether the consent is found to have been voluntary.

Similarly, the fact that the complainant was hitch-hiking wearing a mini-skirt, or is known in the community to be sexually active outside a conventional relationship, or voluntarily entered a residence or vehicle controlled by the assailant, or is economically dependent on the assailant, has no relevance for consent, unless it tends to suggest that the complainant’s verbal and non-verbal behaviour was not voluntary and thus that any explicit or unequivocal implied consent to sexual contact was not valid in law.

Thus *how* we think about and apply rules of law, in this case the legal definition of consent, can eliminate reliance on myth-based social definitions in proof of the *actus reus* of sexual assault. This approach also provides a means to change collective images, social definitions, of what constitutes consensual sex

and what does not and therefore can only be criminal behaviour. But to achieve that outcome, the *mens rea* defence based on honest belief in consent also must be restricted to the narrow range of mistakes of fact that are strictly relevant to the question of voluntary agreement. For it is only insofar as actual convictions result from strict interpretation of the legal definition of consent that the legal definition will in turn influence social definitions of consensual sex and sexual assault.

### **Mens Rea, Mistake, and Inadvertence**

#### *Inadvertence to the Facts*

Much recent debate with respect to *mens rea* offences has centered around the concept of recklessness.<sup>106</sup> Traditionally recklessness has been defined as

106. The attention devoted to this issue in the literature in the last ten years is nothing short of staggering. Of particular interest because of their contribution to the debate about the issue of recklessness in the context of rape and sexual assault are the following books and articles: Susan Atkins and Brenda Hoggett, *Women and the Law* (Oxford: Blackwell, 1984); Bessmer, *Laws of Rape*; Bienen, "Mistakes;" Boyle, *Sexual Assault*; Boyle, Bertrand, Lacerte-Lamontagne, and Shamai, *A Feminist Review of Criminal Law*; Eric Colvin, "Recklessness and Criminal Negligence," *University of Toronto Law Journal* 32 (1982): 345; Cowley, "Recklessness in Rape;" Cowley, "Retreat from Morgan;" Ferguson, "Reasonable Belief in Rape and Assault;" Greener, "Consent-Recklessness-Genuine though Mistaken Belief a Defence;" Goode, "*Mens Rea* in Corpore Reo;" Goode, "The Mental Element of Rape;" Harris, "Towards A Consent Standard in the Law of Rape;" Pickard, "Culpable Mistakes and Rape: Harsh Words on *Pappajohn*;" Pickard, "Culpable Mistakes and Rape: Relating *Mens Rea* to the Crime;" Spencer, "Assault with Intent to Rape — Dead or Alive?;" Stuart, "*Pappajohn*;" Sweeney, "Criminal Law — Rape, etc.;" Wells, "Comment: Law Reform, Rape and Ideology;" Weiner, "Shifting the Communication Burden." The decision of the House of Lords in *D.P.P. v. Morgan*, [1975] 2 All E.R. 347 (recklessness requires subjective awareness even when the deviation from reasonable behavior is extreme), appears to have been the event that riveted attention on the issue of recklessness initially. Since then the decisions in *Caldwell*, [1982] A.C. 341, and *Lawrence*, [1982] A.C. 510, have only added more fuel to the debate by adopting an objective test for recklessness. In subsequent cases some judges writing for the Court of Appeal have assumed that recklessness may be assessed by objective tests in some legislative contexts and by subjective tests in others. This would restrict the application of the *Caldwell* approach, a result desired by many critics. Other critics and courts (including the House of Lords, which in *R. v. Seymour*, [1983] 2 A.C. 493, at 506 asserted that "recklessness" should be given one interpretation that found in *Caldwell* and *Lawrence* — in relation to all offences "unless Parliament has otherwise ordained") have rejected adoption of such a patch-work approach to interpretation of *reckless*. This comment in the House of Lords (which appears *not* to have found favour in Australia or New Zealand — see "Case and Comment," *Criminal Law Journal* 9 (1985): 53) suggests that the approach to recklessness taken by the Court of Appeal in *Kimber* and *Pigg* is to be preferred to that in *R. v. S and S* (1984), 78 Cr. App. R. 149, and *Bashir* (1983), 77 Cr. App. R. 59. And see note 158. Until recently, Canadian judges used the distinction between advertence and inadvertence to distinguish recklessness from negligence. See the authorities cited in note 107. The decisions of the Ontario Court of Appeal in *Sharp* (1984), 39 C.R. (3d) 367; *Barron* (1985), 48 C.R. (3d) 334; and *Tutton* (1985), 44 C.R. (3d) 193, all dealing with interpretation of recklessness in the context of section 202 of the Criminal Code (criminal negligence), follow *Caldwell* and hold that recklessness in this context includes inadvertence to risks of which a reasonable person would have been aware if the inadvertence is a marked and substantial departure from the "reasonable person" standard. In justification of the distinction between recklessness in criminal negligence and *mens rea* offences, it can be argued that the former is different in that it is qualified by its combination with the term *wanton* in section 202, which arguably refers to the degree of deviation from the norm. Curiously, in *Tutton* an exception from the general rule in *Sharp* is carved out for harms caused by acts of omission, liability for which is held to require advertence. It is submitted that this exception cannot be maintained as the distinction between acts of commission and omission, as such, provides no basis for it. It must be observed, however, that *none* of these decisions alter the traditional subjective awareness requirement in *mens rea* offences.

acting with advertence to a risk.<sup>107</sup> Failure to advert to a risk that would have been obvious to any reasonable person is *most* criminally negligent.<sup>108</sup> Advertence to a risk requires subjective awareness, whereas a finding of fault by reference to what the “reasonable person” would have foreseen as a possible circumstance, or consequence, does not.

Although recent developments in the law of criminal negligence suggest broad acceptance for the view that recklessness in *that* context can be established by a gross departure from the reasonable person standard,<sup>109</sup> this interpretation has not been extended to the concept of recklessness as the mental element of a *mens rea* offence.<sup>110</sup> Indeed, the emphasis that has been placed on subjective awareness in the context of *mens rea* offences in Canada since the decisions in *Rees* and *Beaver*<sup>111</sup> would appear to preclude such a development in the absence of specific legislative provisions with respect to particular offences. An alternative means to enforce duties of care, foresight, and advertence would be the creation of new gross negligence offences that prohibited inadvertent causation of precisely those harms which, though they are serious, are most often the result of a failure to exercise care rather than the result of deliberate and premeditated malice.

But from a pragmatic standpoint, legislative reform of the criminal law is not required to penalize gross negligence. For the reasons suggested by Dickson, J., as he then was, in *Pappajohn*,<sup>112</sup> even when the test *is* a subjective test, objective standards are necessarily relied on by the trier of fact in the process of drawing inferences about the defendant’s state of mind. When the risk is an obvious and serious one, a marked and substantial departure from the standard of care that would have been observed by the reasonable person will often leave the trier of fact with no reasonable doubt but that the defendant *was* either reckless, having adverted to the risk, or wilfully blind to the possibility that the harm in question might be a consequence of his actions.

Thus the key impediment to effective use of the criminal law to prevent avoidable risk-taking is not the requirement that there be subjective awareness of risk for conviction of a *mens rea* offence, but rather the standard set by the reasonable person test.<sup>113</sup> A subtle shift of the reasonable person standard

107. See O’Grady and Sparling, [1960] S.C.R. 804, 128 C.C.C. 1, 25 D.L.R. (2d) 145, in which recklessness and negligence were distinguished as involving advertence and inadvertence respectively. The requirement that there be subjective awareness in the form of advertence for a finding of recklessness was maintained in *Leary v. R.*, [1978] 1 S.C.R. 29; 33 C.C.C. (2d) 473; 74 D.L.R. (3d) 103; *R. v. Buzzanga* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.); *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30; 40 C.C.C. (2d) 353; and *Pappajohn*, [1980] 2 S.C.R. 120. I am aware of no case that adopts an objective test, such as that used in *Sharp* to assess recklessness in the context of criminal negligence, to interpret recklessness for the purpose of a determination of liability for a *mens rea* offence (i.e., a “true criminal offence;” see Dickson, J., in *Sault Ste. Marie*, [1978] 2 S.C.R., 1309). For this category of offences the requirement of subjective awareness remains unqualified.

108. Section 202 is the section most commonly invoked. However, see Stuart, *Canadian Criminal Law*, 180, for list of many Criminal Code sections that criminalize negligence.

109. See Sharp, Barron, and Tutton, in note 106.

110. See notes 106 and 107.

111. *R. v. Rees*, [1956] S.C.R. 640; *Beaver v. R.*, [1957] S.C.R. 531; following *Wilson v. Inyang*, [1951] 2 K.B. 799.

112. See notes 15 and 126.

113. Pickard, “Culpable Mistakes and Rape” (both versions).



toward increased social responsibility in all of one's activities which have the potential to cause harm to interests protected by the criminal law would eliminate much of the need for legislative creation of additional offences of gross negligence. For the present, however, it remains the case not only that recklessness in the context of *mens rea* offences requires advertence to risk, but that our culture not only tolerates but encourages "reasonable"(!) risk-taking, and even admires successful "recklessness."

Many people routinely engage in activities that cause harm, some of which is serious, without awareness of the risks and *without* grossly departing from the standard of the reasonable person. This leaves us with a simple but serious problem. The existence of risks that cause serious harm generally do not come to be a matter of common knowledge and concern until there is general knowledge of a significant incidence of actual harm caused. Most risk-generating activities can be engaged in by non-experts, as well as by those whose status as experts implies awareness of risk. Although criminalization may appear to be the appropriate way to respond to grave and avoidable injury to interests traditionally protected by the criminal law, its efficacy as a mechanism to control activities that may cause serious harm is limited; many persons engaging in those activities are unaware of the risks their activities generate and therefore cannot be convicted of any offence more serious than criminal negligence.<sup>114</sup>

If an offence is a *mens rea* offence, the principles of criminal culpability do not permit conviction unless the subjective awareness required by the offence as defined has been proven beyond a reasonable doubt. Sexual assault is a *mens rea* offence. As a consequence, lack of awareness of non-consent and failure to advert to the possibility of non-consent are complete defences to a charge of sexual assault under Canadian law as it is presently being interpreted by appellate judges.<sup>115</sup> Only when lack of awareness is found to be the result of wilful blindness, a deliberate avoidance of awareness, as was found to have been the case in *Sansregret v. The Queen*, is there culpability.<sup>116</sup> Sexual assault has

114. Many sentencing provisions in the Criminal Code permit the judge on sentencing considerable latitude in exercise of discretion. Manslaughter, for example, may be punished by a life sentence, although typical manslaughter sentences appear to fall in the six month to three year range. It is thus possible for commission of an offence requiring only proof of inadvertent negligence to be penalized as severely as one involving similar activity and causing similar harm which requires proof of advertent negligence. This oblique manner of achieving indirectly what cannot be done directly is open to challenge if it is presumed that punishments should correspond to the degree of culpability or blameworthiness and that culpability is by definition greatest for offences requiring an aware state of mind. But see Adolf Reinach, "Die Überlegung; Ihre Ethische und Rechtliche Bedeutung," *Zeitschrift für Philosophie und Philosophische Kritik*, CXLVIII (1912): 181, CXLIX (1913): 30. Adolf Reinach would argue that failure to advert to risk of a grave and avoidable harm may be at least as culpable as the conscious choice to cause the same harm because it may be indicative of more disregard for the law and the interests it protects. If, by contrast, the proper measure of punishment were found to be the harm foreseeably caused, some negligence offences would warrant more severe punishment than deliberate *mens rea* offences of the same general type. In any event, meting out a greater than ordinary sentence for a lesser offence of negligence or strict liability, when conviction for the more serious *mens rea* offence failed due to reasonable doubt as to *mens rea*, is possible only if there is an offence of the same type that merely requires proof of negligence. Such is not always the case. See section 244 for example.

115. See cases cited in note 16.

116. *Ibid.*

no lesser included offence save common assault and that, too, is a *mens rea* offence. Furthermore, there is no offence of negligent sexual assault in Canada.<sup>117</sup> As a consequence, no sexual assailant can be convicted in Canada of any sexual offence to which consent is a legal defence in the absence of proof of subjective awareness of non-consent, advertence to the possibility of non-consent, or wilful blindness to non-consent.

Furthermore, in sexual assault cases the reasonable person standard (commonly used to assist the trier of fact — again referring to Mr. Justice Dickson's observation in *Pappajohn* about the practical significance of the distinction between subjective and objective standards — in deciding whether the defendant could *not* have *not* been at least reckless in the circumstances) focuses on the type and degree of violence used by the assailant and compares it with that used in normal sexual encounters of a similar nature. On this basis, inferences are made about whether there is any doubt but that the assailant intended to continue an encounter though aware of non-consent or the possibility of non-consent. Use of such a standard, rather than one that focuses on facts and circumstances related to consent as defined in law, as such, *ensures* a low conviction rate; normal sex appears to include some quite extra-ordinary forms of interaction, some of which are quite violent. The presence or absence of consent is not seen to be a central issue: rape *is* "normal".<sup>118</sup> The *raison d'être* of this article is summed up in three words.

When an accused was unaware of, or mistaken about, one or more of the factual elements of an offence, and that mistake is such that as a consequence there is a reasonable doubt whether the accused had the state of awareness required for culpability, the accused cannot be convicted. In the case of absolute liability offences, no proof of mental state is required for conviction other than the basic consciousness and capacity for choice presupposed by volition,<sup>119</sup> and

117. Creation of an offence of negligent sexual assault has been widely discussed. Participants in that discussion have represented the whole spectrum of opinion on sexual issues. At one extreme some have rejected that solution because it appears to be a device to "entrap the ordinary healthy and innocent male;" others have condemned it because it appears to "trivialize" the offence of sexual assault. On the debate in Canada, see Boyle, *Sexual Assault*, 75-88; see also Dettmar, "Culpable Mistakes in Rape;" Warner, "The Mental Element and Consent;" and Pickard, "Culpable Mistakes and Rape." It is clear to myself and others, however, that substitution of an objective test for a subjective test is really no solution to the problem at all — not in the context of rape and sexual assault nor generally in law in which individual values and experience affect assessment of the factual and normative issues. It is not a solution because the actual problem does not lie in deviation of an individual assailant's perceptions from those of society in general. See text and notes 55-73, 118, and 129. On the related issue of the use of reasonableness tests in evaluating mistakes of law, see note 139.
118. Catharine A. MacKinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979), chapter 7. See Johnson, "On the Prevalence of Rape," 146, who suggests that rape is the consequence of the nature of everyday relationships in patriarchal society and observes that although the probability of twelve year olds in the United States being sexually assaulted in their lifetime is as great or greater than that of their being divorced or developing cancer, it remains a hidden social problem. Sexual violence is merely typical of what is viewed in United States culture as a "normal interaction" between men and women.
119. King, [1962] S.C.R. 746, per Taschereau, J., involuntariness negates the *actus reus*. Ritchie, J., however, found that involuntariness negated *mens rea*. The relationship of consciousness to the capacities of volition and deliberation considered as aspects of the *actus reus* — on the one hand, and to the cognitive awareness required for *mens rea* on the other, has not been

hence, any mistaken belief as to the facts is simply irrelevant to a finding of legal culpability.<sup>120</sup> In the case of strict liability offences, mental state becomes relevant only if the accused asserts in his defence that he acted in good faith in reliance on a reasonable though mistaken factual belief. In the absence of such a defence, proof of strict liability offences proceeds like that of absolute liability offences, and conviction flows from proof beyond a reasonable doubt of the *actus reus* alone.<sup>121</sup> In the case of *mens rea* offences, if intent, as such, is not

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satisfactorily clarified in Canadian law as yet. The present state of the law on the point is as unclear as it was recognized to be (and left) by Dickson, J., in *Rabey* (1980), 15 C.R. (3d) 225, 255 (S.C.C.), in which he stated: "Whether lack of consciousness relates to *mens rea* or to *actus reus* or both may be important in a case in which the offence charged is one of absolute liability, but the conceptual distinction does not concern us in the case at bar."

120. But see *Kilbride v. Lake*, [1962] N.Z.L.R. 590 (S.C.). It is essential to recognize that as a consequence of the reasons for judgment authored by Lamer, J., in Reference Re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288 (1985), 48 C.R. (3d) 289 (S.C.C.), all absolute liability offences for which the punishment may be imprisonment are arguably contrary to section 7 of the Charter and may or may not be justifiable under section 1 of the Charter. Lamer, J., arrives at this conclusion by equating innocence and conviction in the absence of proof of awareness of what one is doing (on the facts of the case at hand this must be in the broad sense, in which "what one is doing" includes its legality or illegality, not merely its description in empirical or socio-factual terms). Wilson, J., arrives at the same result by a quite different route that avoids Lamer, J.'s, emphasis on the common law doctrine of *mens rea* and instead relies on punishment theory to elucidate fundamental justice, and in turn find the punishment of mandatory imprisonment excessive for the offence in question. Despite the difference in approach taken by Wilson, J., in the end, she too clearly places weight on what the accused knew. However, the knowledge the accused had is seen to bear not on the constitutionality of conviction, for this is not found to be in violation of the Charter, but only on the constitutionality of imprisonment as a sentence on conviction. It is the imprisonment of someone who may have shown due diligence in attempting to ascertain the status of their licence and who drove while under suspension, thereby committing an offence unknowingly and unwittingly, which is, in her view, "grossly excessive and inhuman." 48 C.R. (3d), 333. The elements of knowledge and responsibility for lack of knowledge are both mentioned.

It is clear that a number of significant issues, that will effect future interpretation of section 7 and this case, remain to be clarified. These issues include: the relation of consciousness to *mens rea* and the *actus reus*; the extent to which the common law doctrine of *mens rea* is to be determinative for principles of fundamental justice under a statutory regime; whether a "guilty mind" can never be a mind that is unaware of the legal characterization of what an accused is aware of doing (if so, section 19 would be contrary to section 7 of the Charter); whether innocence is equivalent to "absence of proof of awareness of what one is doing" (Are there no offences that could not be committed by a conscious person unless that person was also aware of what they were doing or unless that person was acting with less than due diligence?); what constitute the theoretical differences between the basis for liability to conviction for a criminal offence and liability to be punished on conviction; under a statutory regime to what extent, if any, does liability to conviction imply moral responsibility; whether it might not be preferable to develop a doctrine of "Charter estoppel" whereby the state could not prosecute an absolute liability offence if the accused could adduce some evidence to show that as a consequence of the design or operation of state-controlled mechanisms for the administration of justice it had been impossible to ascertain with certainty the legality of what he was aware he was doing. The estoppel approach could also be used to respond to objections to the conviction of persons who unwittingly violate the law in reliance on authority. By using estoppel in both types of cases, fairness to the individual accused could be achieved without twisting and distorting fundamental principles of legal liability to do so. This would remove one obstacle to the continued use of absolute liability offences. Unless these questions are given serious consideration, it is clear that the Charter may well soon be seen to require that all criminal offences for which imprisonment is available as a penalty be *mens rea* offences (strict liability offences may violate section 11(d) of the Charter), and that the awareness required for conviction include actual awareness of the *illegality* of the act.

121. *Regina v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, [1978] 2 S.C.R. 1299 (S.C.C.); *R. v. Chapin* (1979), 45 C.C.C. (2d) 333, 95 D.L.R. (3d) 13, 26 N.R. 289 (S.C.C.).

shown, either recklessness or wilful blindness with respect to the factual element about which the accused claims to have been mistaken or unaware, will suffice to establish the existence of the mental element or state of awareness required for conviction.

In all of these cases it is irrelevant for legal culpability whether the accused knew anything about the law.<sup>122</sup> The key question, in each case in which the issue of *mens rea* arises, is whether it has been shown beyond a reasonable doubt that the accused had the requisite awareness of, was not mistaken with respect to, the factual elements that constitute the offence. In the case of strict liability offences, the issue is whether the mistake or lack of awareness with respect to the factual element was unreasonable in the circumstances, or was the consequence of negligence or lack of due diligence. The standard in strict liability cases is objective, whereas actual subjective awareness of facts sufficient to generate an inference of intent, recklessness, or wilful blindness is required for conviction of a *mens rea* offence.<sup>123</sup>

In the case of *mens rea* offences, a demonstration of reasonable effort to ascertain factual elements relevant to the offence and of whose possible existence one is aware will, by definition, clearly negate any inference of recklessness or wilful blindness. It is reasonable, however, and hence neither reckless nor wilfully blind, to exert no effort whatsoever with respect to a possible fact, possible circumstance, or probable consequence if one is unaware of any reason to regard its existence as possible. At the same time, stupidity (the condition of lacking the mental ability to draw inferences and arrive with reasonable speed at correct conclusions about states of affairs existent, possible and probable on the basis of information about social and empirical situations)

122. It is suggested that an accused may be ignorant of the law, of facts, or make a mistake of mixed law and fact. A single mistake about law, as such, provides no defence; it is invariably equivalent to simple ignorance of the applicable law. A single mistake of pure or independent fact, that raises a reasonable doubt whether the accused had the basic mental capacity to act voluntarily or appreciate facts, will lead to an acquittal. Mistakes relevant to the determination of whether there was *mens rea* are inevitably mistakes of mixed fact and law. It is submitted, however, that the mistake provides a ground for a *mens rea* defence only in those cases in which the mistake of fact has "caused" the defendant to fail to appreciate that his conduct was illegal; the reverse situation, in which ignorance of the law or a mistake about the application, meaning or interpretation of the law "causes" a mistake of fact, provides the defendant with no defence; the mistake is only nominally one of fact, but at root one of law. This approach is introduced explicitly in the text below following note 126. For an example of a situation in which a mistake of fact arguably "caused" a mistake of law, see *R. v. Cunningham* (1979), 45 C.C.C. (2d) 544 (Ont. Div. Ct.). For a good illustration of a situation in which ignorance of the law arguably "caused" failure to advert to a question of fact, see *Gaumont British Distributors Ltd. v. Henry*, [1939] 2 K.B. 808. The court did *not*, however, take the approach proposed here and instead found the offence of "knowingly making a record...without the consent in writing of the performers" not to have been made out where the persons charged under the Act had not "applied their minds" to the question of consent "because" they were ignorant of the requirements of the Act. Thus failure to advert, though *caused by* ignorance of the law, excused. Under the approach proposed in this article, the mistake would *not* excuse, although prosecution might well be estopped. See note 120.

123. The culpability that McIntyre, J., writing for the Supreme Court of Canada, found to exist in *Sansregret* (a decision widely regarded as difficult to reconcile with the general law of *mens rea*) arguably flows from failure (self-serving and avoidable) to exercise the capacity to draw inferences about possible facts from those facts of which the defendant was aware. In the result the *mens rea* resembles an act of omission; culpability flows from a finding of a failure to inquire despite possession of capacity, control, and knowledge of facts sufficient to provide grounds for suspicion of other facts relevant to the definition of the offence.

and low perceptual acuity are not themselves criminal offences. An accused person cannot be convicted of a full *mens rea* offence if the trier of fact is convinced that the accused may not have even been aware of the possibility of, that is, may have had a blank mind with respect to, a fact, possible factual circumstance, or probable factual consequence that is an essential element of the offence.

The problem that blank and inadvertent minds pose for regulation of activities that cause serious harm has generated controversy in academic circles. Protagonists who are of the view that without actual subjective awareness there is no criminal culpability in the proper sense, resist the introduction of objective tests to determine culpability for "true" crimes, full *mens rea* offences.<sup>124</sup> Others argue that the criminal law is a product and instrument of social policy and that social priorities sometimes do, and should, override principles of criminal culpability, or at least influence interpretation of their significance. On this view, the absolute equation between "true crimes" and offences defined to require proof of subjective awareness of all elements of the offence as a condition of conviction, is too broad and ultimately misleading.<sup>125</sup> Still others adopt a pragmatic practice-oriented view and, like Dickson, J., (as he then was) in *Pappajohn*, suggest that this controversy is a red herring because, although the subjective test is the proper one in which the offence is one requiring *mens rea*, in most cases the result will be the same under either test; in those few in which it is not, the trier of fact can be relied upon in applying the subjective test to distinguish what Dickson, J., calls a "cock-and-bull story" from "genuine" lack of awareness.<sup>126</sup>

124. Stuart, "*Pappajohn*;" Goode, "Mens Rea in Corpore Reo;" and Goode, "The Mental Element of Rape." Writing with vigour in support of rejection of a proposal to amend the mental element of the offence of rape in South Australia, M. R. Goode asserts: "A touchstone of the civilization of any given society must be the extent to which it is capable of resisting the hysterical appeals to the capacity of that society to victimise and scapegoat the many in order to pander to the demands of the vociferous few." M. R. Goode, "The Mental Element," 17.
125. See Pickard, "Culpable Mistakes and Rape: Relating *Mens Rea* to the Crime;" and Pickard "Culpable Mistakes and Rape: Harsh Words on *Pappajohn*;" Boyle, *Sexual Assault*, 75-93; John Sellers, "Bad Excuses."
126. See note 15. Dickson, J.'s, comments in *Pappajohn* about the objective / subjective tests and *mens rea* arguably apply to any *mens rea* offence. Canadian criminal law necessarily places heavy reliance on objective or "reasonableness" tests as aids in ascertaining actual states of mind. It is often difficult to state with "moral certainty" what the actual state of mind of a particular individual was. In these cases objective standards and tests are used to assist the trier of fact to make inferences about the actual state of mind. Strictly speaking, however, the standard to be applied remains a subjective one. The question is: "What was the state of mind of *this particular* accused person?" By contrast, in the areas of criminal negligence and constructive homicide, reference to what the average person would have been aware of, or inferred, in the circumstances, is the standard used to decide whether a particular accused should be deemed to have adverted to a particular risk. Some improvement is achieved by particularizing objective tests to take into account the knowledge and characteristics of individual accused persons. It is arguable, however, that it is always in conflict with the principle of subjective awareness to convict an accused on the ground that as trier of fact you find his exculpating explanation lacks credibility because the "reasonable man" in your opinion(!)\* would have been conscious of different facts, consequences, and risks, and would have reasoned differently in the same situation. The problem remains even when the trier of fact uses a particularized or individualized "reasonable man" test to allow for the characteristics of the accused. If it is a fundamental principle in Canadian criminal law that culpability for *mens rea* offences requires proof beyond a reasonable doubt of an aware state of mind in the individual accused, is it not always contradictory to rely on objective tests, even

At the same time the ground over which the subjectivists and objectivists have battled in the years since the *Pappajohn* decision has been significantly eroded as a consequence of recent high court interpretations of “recklessness” in criminal negligence and of “wilful blindness” in the context of *mens rea* offences. Continuing a process that started in *Sault Ste. Marie*,<sup>127</sup> Canadian judges appear to be moving toward an overt analysis of criminal culpability in which the distinction between subjective awareness and fault imputed by reference to objective standards, as such, may often no longer be a reliable indicator of “true criminality.” The judgments by Lamer, J., and Wilson, J., in the *Motor Vehicle Reference* case<sup>128</sup> are further evidence of this development and arguably suggest that fundamental justice does not necessarily preclude the imposition by statute of serious penalties for commission of any offence, however the mental element is defined, *as long as the defendant has a fair opportunity to challenge the inference of culpability*. As long as this condition is met, there appears to be, as yet, no constitutional impediment to the imposition by statute of quite severe penalties on agents who negligently and inadvertently cause avoidable harms.

Thus with legislation the “gap” identified above in the regulation of harmful activities can be closed without violation of the constitution. The approach proposed in this article would have much that same effect in the context of sexual assault without the need for new legislation, and without perpetuating the present severe truncation of effective protection for the right of self-determination in sexual relationships that doubtless will persist if reasonable person tests are explicitly adopted to regulate the types and degrees of persuasion that can be used in negotiation of sexual transactions.<sup>129</sup> In the last two sections of this article, I return to this problem.

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as mere aids, to prove that the requisite state of mind actually existed? Such methods of proof must inevitably result in the conviction of some “innocent” persons. Furthermore, the highly discretionary nature of the distinction between the “cock and bull” story and a “genuine” mistake, such as Dickson, J., referred to in *Pappajohn*, must inevitably work more to the detriment of some accused than others. It is one matter to assess credibility on the basis of full information about an individual, but quite another to determine whether one person’s explanation is credible by comparing it to the explanation the “average” person or even the “average” person with similar characteristics and experience might give. It is therefore suggested that if the arguments against reliance on objective tests to ascertain the accused’s state of mind were followed to their logical conclusion, the result would be abolition of all offences requiring proof of a particular state of mind for conviction and the reconstruction of criminal law along altered lines. Conduct and physical control — both issues that can be ascertained as matters of objective fact — would be the basis for attribution of criminal liability. The fiction that conviction of a *mens rea* offence is based on proof beyond a reasonable doubt of the requisite “guilty” mind would be abandoned in favor of scrutiny of harm caused by what the accused did or failed to do. The state of mind of the individual would no longer be relevant. The only defences would be lack of capacity or opportunity to exercise choice and lack of physical control over the means by which the harm was caused. This is a direction for reform that appears to have a long gestation period. In 1477, Chief Justice Brian of Common Pleas said, “The thought of man is not triable; the devil alone knoweth the thought of man.” *Year Book*, 17 Pasch Ed. IV f.1. pl. 2, as cited in H.L.A. Hart, “Changing Conceptions of Responsibility,” as reprinted in *Punishment and Responsibility: Essays in the Philosophy of Law*, 186-209, 188.

127. See note 121.

128. See notes 120, 147, 164-168, and 176-179, and accompanying text. It must be realized that it is premature to attempt to state authoritatively the full implications of the decision in this case. Many issues remain unresolved; see note 120.

129. See text and notes at 117 and 118.

*Inadvertence to the Law or to Illegality on the Facts*

When the accused was aware of all facts, circumstances, and probable consequences, described in empirical or social-factual terms, that were relevant to commission of the offence, the issue of mistake of law may arise. In this situation the accused may say — “I am ‘innocent’ in that, although I intended to do what I did, I did not intend thereby to break the law, nor was I reckless or wilfully blind to the possibility that I was breaking the law.” Subject to the specific statutory exceptions referred to above and discussed below, section 19 of the Criminal Code bars an excuse based on ignorance or mistake of law to negative *mens rea* in these circumstances. This is the case whether the lack of knowledge of illegality is what is sometimes referred to as a general mistake of law, or an error in interpretation of the scope, meaning, or application of the law given the facts.<sup>130</sup>

There are only two types of exceptions to the general rule codified in section 19. All instances of each, with the exception of those based on the rapidly evolving doctrine of officially induced error of law,<sup>131</sup> are expressly provided by statute. The first type of exception arises as a consequence of the Statutory Instruments Act, which bars conviction for contravention of a regulation if the regulation had not been published at the time of the alleged offence.<sup>132</sup> Non-publication does not invalidate the regulation, it merely bars

130. See note 35; Stuart, *Canadian Criminal Law*, 261; Mureinek, “The Application of Rules.” Whether this *should* be the law in all circumstances without exception is quite a separate issue. For example, courts in Australia (Thomas (1937), 59 C.L.R. 279 (H.C.)), England (Gould, [1968] 2 Q.B. 65 (C.A.)), and Canada (Woolridge (1978), 40 C.C.C. (2d) 30 (Sask. Prov. Ct.)) have recognized an honest belief that a previous marriage has been dissolved as a defence to a bigamy charge. The earlier position, disallowing the defence as one of mistake of law, is found in *R. v. Wheat and Stocks*, [1921] 2 K.B. 119 (C.C.A.). In Thomas, having concluded that the critical mistake was one of fact, Mr. Justice Dixon stated: “But in any case, in the distinction between mistakes of fact and law, a mistake as to the existence of a compound event consisting of law and fact is in general one of fact and not a mistake of law.” 59 C.L.R., 306. The contrary view is found in Mureinek, in note 18. Were Dixon, J., correct we could all but abolish the appellate courts. Thus it is clear that the key factor is not the technical question of what constitutes the proper classification of mistakes of “mixed” fact and law, but rather whether all the consequences of the traditional classification are to be tolerated. With that question in mind, errors in application and interpretation of the law that result from reliance on authority and advice have been extensively discussed. Stuart, *Canadian Criminal Law*; Arnold, “State-Induced Error of Law;” Brett, “Mistake of Law,” 186; O’Connor, “Mistake and Ignorance,” 653; Smith, “Error and Mistake,” 6; Keedy, “Ignorance and Mistake,” 90; Hall and Seligman, “Mistake of Law,” 654. All of these authors recognize that it may sometimes be unfair *not* to distinguish between total ignorance of the law and error in application of the law. The person who shows cavalier disregard for the law can be distinguished from the individual who seeks and relies on advice about the law not knowing it to be “incorrect.” Indeed, two persons, both seeking advice about the law, may be equally distinguishable: one seeking to do all the law requires, the other interested in knowing how best to avoid the law without being seen to evade it. Fairness and other issues of moral culpability related to an individual’s knowledge of the law are best left to sentencing. That is the place to assess the moral quality of a defendant’s ignorance of the law. An analogous problem exists with respect to the distinction between ignorance and mistake about the facts. See Goode, “*Mens Rea* in *Corporeo Reo*,” 459-464.

131. The doctrine of officially induced error has been developed by the judiciary. It is submitted that a Charter “estoppel” approach is to be preferred as it would avoid unjust treatment of individual accused persons without the distortion of fundamental principles of liability that the doctrine of officially induced error may invite.

132. Statutory Instruments Act, S.C. 1970-71-71, c.38, section 11(2). In *Regina v. Tenale et al.* (1982), 3 C.C.C. (3d) 254 (B.C.C.A.), the judge applied section 11(2) and held that the

enforcement by conviction subject to those further exceptions enumerated in the subsection. Lack of fair notice is the underlying rationale for this exception to the general rule and for the exception that has been created for cases involving officially induced error as to what the law required.<sup>133</sup>

There are a number of exceptions of the second type.<sup>134</sup> Of these the provision that has been most often interpreted by judges is section 283(1) of the Criminal Code, which defines theft as a fraudulent taking or conversion "without colour of right." The case law makes it clear that "colour of right" encompasses both general mistakes as to what the law is, and mistakes of mixed law and fact or application of the law to the facts.<sup>135</sup> Section 283(1) codifies the common law definition of theft which recognized that proprietary rights are a complex area of private law. Reliance on the simple existence of proprietary rights at private law, to define the circumstances under which operation of the criminal law is triggered, would place all persons who deal in good faith with property at continual risk of conviction for the offence of theft if the excuse of mistake of law were barred. The colour of right exception extends protection from conviction at criminal law to persons who act with respect to property in reliance on an honest belief about the facts and the law as it applies to those facts.<sup>136</sup>

In principle, the same argument should apply to enforcement of *any* criminal prohibition whose definition in effect incorporates complex aspects of

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respondents could not be convicted of contravention of a regulation that had not been published at the time of the offence. The regulation had purportedly been made pursuant to the Fisheries Act, R.S.C. 1970, c. F-14.

133. On the recent Canadian treatment of officially induced error, see Nancy S. Kastner, "Mistake of Law and the Defence of Officially Induced Error," *Criminal Law Quarterly* 28 (1985 / 86): 308.
134. See section 39 (possession of moveable property under a claim of right); section 42 (claim of right to possession of dwelling house or real property and entry by "a person who is lawfully entitled to possession of it"); section 73(2) (detaining real property without colour of right); section 249-250.5 (abduction of person under sixteen years of age and lawful care or charge); section 283 (theft and taking or converting without colour of right); sections 386 to 402 (wilful acts against property and colour of right).
135. See *R. v. Howson*, [1966] 2 O.R. 63, 47 C.R. 322 (C.A.); *R. v. Demarco* (1973), 13 C.C.C. (2d) 369 (Ont. C.A.); and *R. v. Spot Supermarket Inc.* (1979), 50 C.C.C. (2d) 239 (Que. C.A.). The distinction drawn by Rand, J., in *Shymkovich* (1954), 110 C.C.C. 97 (S.C.C.), between mistake of law and a mistaken belief in the existence of a particular property right is now generally avoided. The specific statutory provision of colour of right as a defence overrides the more general section 19 and renders irrelevant any distinction between mistake as to general law and mistake as to the legality of a particular claim in specific circumstances. *Shymkovich* is thus no longer regarded as an authoritative statement of the law with respect to colour of right. See, for example, the comments of Lamer, J.A., (as he then was), in *R. v. Spot Supermarket Inc.* (1979), 50 C.C.C. (2d) 239, 249 (S.C.C.), on Rand, J.'s, remarks in *Shymkovich* on the defence of colour of right.
136. With the exception of sections 249 to 250.5, dealing with the abduction of children, all of the provisions of this type in the Criminal Code relate to property claims. The mistake must be an honest one made in good faith. The honesty of the mistake, not the prior question of whether the accused was correct or mistaken about his legal entitlement to take payment, is the issue the jury must decide when colour of right is raised in defence to a charge under section 294(a); see *Lilly v. The Queen* (1983), 5 C.C.C. (3d) 1 (S.C.C.). See also *R. v. Spot Supermarket* (1979), 50 C.C.C. (2d) 239 (Que. C.A.), in which evidence of concealment of records by the defendants was found to imply fraudulent intent, *not* honest mistake. And see *Natarelli*, [1967] S.C.R. 539, holding that there is no colour of right defence available in extortion.



private or other non-criminal law.<sup>137</sup> It must be recognized, however, that section 283(1) and the other examples of this type of exception in the code are statutory exceptions to the general rule codified in section 19. In the absence of an applicable statutory exception or a constitutional bar to prosecution,<sup>138</sup> it is submitted that the proper approach is to disallow the excuse of mistake of law and convict. Sentence upon conviction can be adjusted as is appropriate given the facts of the case and the public policy considerations that are relevant.<sup>139</sup>

137. For a brief period of time following the Supreme Court of Canada decision in *R. v. Prue; R. v. Baril* (1979), 46 C.C.C. (2d) 257, it indeed seemed that such an argument could be made and that Prue; Baril was authority for classification of *any* mistake of mixed fact and law, as one of fact for the purposes of allowing a *mens rea* defence. Donald Stuart certainly read the decision in this manner and welcomed the majority judgment as a "key weapon in any effort to by-pass Section 19 by classifying a mistake as one of fact rather than law." Stuart, *Canadian Criminal Law*, 291-92. The decision in Prue; Baril must be seen in context along with related cases, however. When this is done, its implications are arguably far less sweeping with respect to the mistake of law and fact distinction than Donald Stuart suggests, especially as the decision is not well-reasoned. The actual basis for the decision in Prue; Baril appears to have been constitutional. Conviction of an individual of a federal criminal offence requiring *mens rea* on the basis of violation of a provincial statute would result in some individuals being convicted with *mens rea* and some without as a consequence of differences in the operation of the licence suspension and notice provisions between provinces. By classifying lack of knowledge of the legal consequences of conviction as a mistake of fact, rather than law, the Supreme Court ensured that all defendants were placed in the same position no matter which provincial law was relevant. Since the decision in Boggs (1981), 19 C.R. (3d) 245 (S.C.C.), holding section 238(3) to be unconstitutional on the ground of *vires*, and the decision in MacDougall (1982), 1 C.C.C. (3d) 65 (S.C.C.), Prue; Baril is arguably relevant only when a federal criminal offence incorporates provincial statute law and the result is variation between provinces in the *mens rea* requirement. In retrospect, I suggest, the case of Prue; Baril merely demonstrates that full definition of the elements of federal offences, without reliance on incorporation of elements from one of a number of other bodies of law in the alternative, is the best formula to avoid enactment of unenforceable federal penal law.

138. On the proposal that there be a Charter-based estoppel to bar prosecution of cases in which the accused made an "officially induced" error of law, see notes 120, 177-79.

139. An alternate approach that would probably meet with the approval of some critics, would be enactment of the following amendment to section 19 of the Criminal Code: "Ignorance of the law is not an excuse for commission of an offence, unless it was reasonable in the whole of the circumstances for the accused not to appreciate that his act or omission might be an offence." The effect of this amendment would be to move the exercise of judicial discretion, with respect to deciding whether the accused exercised reasonable care in ascertaining the law, from the sentencing stage to that of determination of guilt. Over-all this approach might appear to be more desirable in that it would avoid "technical" convictions. Judicial discretion has produced serious problems of disparity in sentencing, however, and analogous problems could be anticipated if conviction were also discretionary. As well its adoption would require action by Parliament. The main focus of this particular article is on those changes that will have a positive or desirable effect, rather than one which is retrograde, and can be achieved by new interpretations of existing law. Furthermore, the alternate wording for section 19 would not result in significantly different outcomes, in any event, as long as a policy is in effect of upholding the principle that individuals are responsible for knowing the law relevant to the activities in which they engage. In the end this is the critical issue, however it is packaged, and whether assessment of "fault" associated with failure to know or understand the law occurs at trial or sentencing. Accordingly, as I am of the view that the principle that the individual has a duty to know the law: (1) is of critical importance in a society governed by positive law, rather than by "custom;" and (2) is more effectively enforced if the present section 19 is retained and applied, than it would be if the inquiry at trial were restricted to the matter of "reasonableness," I do not support amendment of section 19.

And see John Newdigate, "Some Thoughts on Mistake of Law," in which he discusses the merits of the decision by the highest court in South Africa in *S. v. DeBlom* 1977, (3) S.A. 513 A, to abandon the rule that "ignorance of the law is no excuse." Following De Blom, however, South African judges have asked whether the accused should have known the law in question. The result has thus been not a total abandonment of the rule, but rather substitution of a

If experience with the approach proposed<sup>140</sup> results in minimal penalties for a large proportion of the convictions for any particular offence, this would strongly suggest that the definition of the offence requires revision, or that a public legal education program is needed not that the proposed approach is inappropriate. To conclude that there is no *mens rea* each time the accused makes a mistake (whether a general mistake or one of application of the law) with respect to a complex issue of non-criminal law that has been incorporated in the statutory definition of the criminal offence, may often be to deny fundamental interests protection by the criminal law. If we are to have a criminal code for the purpose of providing protection by the state for individual and collective interests in life, liberty, and property, then it must be drafted in a manner that permits its effective enforcement. To draft a code that expands state power in the public interest in terms so vague or complex that justice to the accused precludes its enforcement, is at best a pointless exercise and at worse duplicitous.<sup>141</sup>

It is therefore submitted that in the absence of a statutory exception, recognition of mistake of law or of mixed fact and law as an excuse to negative *mens rea*, on the basis of a rationale like that which underlies the statutory exception in the case of theft, should be avoided.<sup>142</sup> The case law demonstrates, however, that *characterization of a mistake as one of fact is a device that has*

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negligence standard. John Newdigate suggests that judges have done this in recognition of the unsatisfactory social results (those discussed long ago by Oliver Wendall Holmes) that would flow from total abandonment of the rule that ignorance of the law is no excuse. In conclusion, citing in support both R. C. Whiting, "Changing the face of *mens rea*," *South African Law Journal* [1978]: 1, and Stuart, *Canadian Criminal Law*, 267, John Newdigate proposes a "reasonableness" test. He observes that "Allowing ignorance of the law to excuse so long as that ignorance is reasonable, leads to a watering down of the purely subjective approach to *mens rea* with a large dose of normative objectivity." He argues that the candour of the approach is one of its most desirable characteristics. But even John Newdigate concedes that the approach will increase judges' discretion because it involves making a value judgment about a person's ignorance of the law.

As to the concept of "reasonableness" itself, John Newdigate says: "The concept is a difficult one to pin down, and I will not attempt a definition here, but it is a term which is found in most common law systems, and should not cause courts too many problems." Newdigate, "Some Thoughts," 12. I submit that this pat response simply avoids the issue and ignores the very serious problems associated both with judicial discretion and the use of "reasonableness" standards to regulate activities involving normative issues about which there is no societal consensus. See note 117. To use a "reasonableness" standard to regulate such activities is to abandon not merely the rule that ignorance of the law is no excuse, but the very "rule of law" itself.

140. Actual use of the distinction between mistake of law and fact in Canada is more in accord with the approach proposed here than is use of the distinction in England. This is to be expected as a consequence of the statutory prohibition found in section 19. English cases dealing with this issue are decided on the basis of the common law rule.
141. Though it is certainly pointless and duplicitous if the desired goal is the provision of effective protection for fundamental interests, it is just as clearly often a most effective political device to please most of the people at least some of the time.
142. As noted above, Donald Stuart is the most vehement Canadian critic of the rule that ignorance of the law is no excuse. In his writing on the subject he has characterized the rule as "cruel" and "harsh" because it dictates the conviction of persons who commit offences not knowing that what they are doing is illegal. See Annotation of *R. v. Robertson* (1984), 43 C.R. (3d) 39, 40, for example. See also Stuart, *Canadian Criminal Law*, 260-293 and above, notes 10, 11, 27, 137, and 139. Although (believe it or not) I share his concern for the individual defendant who faces criminalization as a consequence of this rule, I am of the opinion that our collective interest (including that of the accused in the guise of potential victim) will be better served overall in the long run by retention of the rule.

often been utilized by judges to effect an acquittal, quite in the absence of any exception provided by statute, even in situations in which the claim of mistake would not have been credible had the accused not been mistaken about the law.<sup>143</sup> This has been most apt to occur when the law is obscure or the conduct of the trial itself has been influenced by social definitions of the offence with which the accused is charged. Widespread reliance by lay persons on an inaccurate definition of an offence lends credibility to the defendant's assertion that his mistake was an honest one.

In most of these cases the tacit criterion applied to determine whether a particular mistake is to be classified as one of fact or law appears to be "moral turpitude."<sup>144</sup> Furthermore, when the mistake, however it is classified, is seen to

143. Examples of this may be found in Howson and DeMarco, and above note 135. In Bohman (1974), 20 C.C.C. (2d) 117 (Ont. Dist. Ct.), the accused had acted *knowing* that the legality of what he was doing was unclear; the court declined to acquit although mistake was argued by Bohman in an attempt to negative "mens rea." His awareness of uncertainty in the law operated to exclude any *bona fides* in his belief that his actions conformed with the law. In the circumstances, however, (it was a "test case" created to clarify the law) the court did reduce the fine imposed at trial. Wilson v. Inyang, [1951] 2 K.B. 799 is an excellent example of the weight placed on the *honesty* of the mistake. Inyang was an immigrant who believed himself to be properly described as a "physician," but who was at law not a "physician." He was acquitted on a charge of violating section 40 of the Medical Act, 1858, which prohibited the wilful and false use of the title physician. This case illustrates that incorporation of the terms *malicious*, *fraudulent*, or *dishonest* in a statutory provision facilitates use of arguments of "colour of right" or "honest belief" to negative *mens rea*. And so it should. However, eventual abandonment of the discredited distinction (see Dickson, J., dissent in Leary (1977), 33 C.C.C. (2d) 473 (S.C.C.), and O'Connor (1980), 29 A.L.R. 449 (Aus. H. C.)), between specific and general or basic intent should curtail extension of those same arguments to negative *mens rea* in the *absence* of a specific statutory authorization for their use. It is such unauthorized extensions that the present article criticizes.
144. As we saw in note 143, when the law specifically provides that there shall be no conviction unless the action in violation of the law is found to have been done in conscious defiance of the law, absence of such disregard for law (as, for example, when there is a good faith reliance on a mistaken belief about the law or its application on the facts) will lead to acquittal. In general, however, it is clear that even in the *absence* of such a specific provision in law, innocence and honesty in the over-all conduct of an individual accused often influences the court in the accused's favour; the distinction between mistakes of fact and law is commonly used in such cases to extend a defence of honest mistake of fact to the accused. See R. v. Darquea and Martyn (1979), 47 C.C.C. (2d) 567 (Ont. C.A.) (technicians in lab in possession of controlled drug in mistaken belief that lab was duly licensed); R. v. MacPhee (1975), 24 C.C.C. (2d) 229 (N.S. Prov. Mag. Ct.) (reliance on advice from police that weapon was not restricted); R. v. Vlcko (1972), 10 C.C.C. (2d) 139 (Ont. C.A.) (failure to realize that victim of assault was police officer negatives *mens rea*). Dishonesty, recklessness, or general involvement in pursuits that are illegal, of dubious legality, or that are seen to require strict regulation, alienate the sympathy of judges. When this occurs the fact/law distinction is then often used to bar a *mens rea* defence by classifying the mistake as one of law. The mistake may still be "reasonable," (one that *anyone* might make because of the vagueness or uncertainty of the relevant law or legal definition); and the mistake typically will not have been shown to be "dishonest" beyond a reasonable doubt and thus would support a defence of lack of *mens rea* if the mistake were characterized as a mistake of fact. But a finding of *general mal fides*, or of anything that even suggests bad faith or an attempt to evade regulation by law, appears to influence judges to use their discretion to classify mistakes that have elements of both fact and law as mistakes of law. This has the effect of barring extension of a defence of honest mistake to the accused on the specific point at issue as would be possible if the mistake were classified as one of fact. Once the mistake is classified as one of law, conviction is the *only* possible result. R. v. Prairie Schooner News Ltd. (1970), 75 W.W.R. 585 (Man. C.A.) (importers of publications remain at risk of courts deciding materials to be obscene, admission of materials by customs officials not grounds for an honest belief that materials are not obscene as a matter of fact; issue remains one of law); R. v. Walker and Somma (1980), 51 C.C.C. (2d) 423 (Ont. C.A.) (belief in legality of importation

be a mistake that could *only* be made by a person acting with wilful blindness or reckless and wanton disregard for key interests protected by the criminal law, the mistake, even if it is properly classified as one of fact, is not permitted to negative *mens rea*.<sup>145</sup> In these circumstances the possibility that the mistake of fact might not have been made if the accused had not *also* been mistaken about the law, if raised, will not assist the accused. Ignorance of the law with respect to an element of an offence, accompanied by ignorance of key facts with respect to that element of the offence, does not necessarily strengthen one's claim that the act was committed in the absence of a culpable mental state.<sup>146</sup> The defence

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however, that given the mental element of the offence in question, a mistake of fact that only could have occurred through a lack of due diligence would not have led to a different result on the facts in any event.

of goods without a declaration is mistake of law — evasion of regulation); *Riddell v. R.* (1973), 11 C.C.C. (2d) 493 (Que. C.A.) (reckless in ascertaining importation duty; subsequent mistake one of law). Even in a minor speeding offence, such as *Cunningham* (1979), 45 C.C.C. (2d) 544 (Ont. Div. Ct.), the overall carelessness of the conduct of the accused may have influenced the court to invoke the "mistake of law is no defence" rule even though the mistake was arguably at root one of fact (misreading a speed-sign) that in turn caused a mistake of law. And see reasons by Van Camp, J., to that effect. It may be noted,

This analysis of how judges have used the mistake of law and fact distinction confirms the general accuracy of the observations by Donald Stuart and Christine Boyle about cases involving mistakes in application of the law; see note 27. Donald Stuart, of course, supports an *expanded* use of the criteria of fault and absence of "fault" to avoid conviction of those accused who are not "blameworthy" because they acted under a misapprehension of the law or its implications in the circumstances. As is probably clear by this point, I do not because I view the issue of blameworthiness and moral culpability as one which cannot be coherently dealt with in connection with the issue of legal liability to conviction in the context of a positive law regime other than as that law itself provides for a justification or excuse. Legal responsibility cannot be avoided merely because a judge feels sympathy for the accused and believes the accused "ought" not to be held accountable.

145. This attitude can be seen at work in the old case of *Prince* (1875), L.R. 2 C.C.C. 154. *Ladue v. R.*, [1965] 4 C.C.C. 264 (Yukon Terr. C. A.) involved bizarre facts and arguably dubious legal analysis, but provides a modern illustration; indeed in this case not only did the judge find that the mistake (believing a dead person to be alive) did not negate the *mens rea* required for the offence charged (intent to indecently interfere with a dead body), but he permitted the *mens rea* of rape to supply the requisite *mens rea* for the offence charged. In *McAuslane v. R.*, [1968] 1 O.R. 209 (C.A.), the accused was held to be barred from alleging an honest belief that certain books were not obscene because he had not even examined the books. Conduct that displays lack of any effort will not support a defence of belief in the proper sense, let alone honest belief. *Kundeus*, [1976] 2 S.C.R. 272, gave higher authority to the analytic device used in *Ladue*. *Kundeus'* conviction for possession and trafficking in LSD was upheld on the ground that he had the *mens rea* for the offence of selling mescaline. The decision has been widely criticised as it appears to permit the *mens rea* element of an offence charged to be supplied by the *mens rea* to commit any other offence. Demonstration that if the facts had been as the accused believed them to be an offence would have been committed, suffices for conviction for the offence as charged. To prevent conviction the mistake of fact must be one that would make the conduct legal, not merely other than the offence charged.
146. Mistakes will not assist an accused who is found to be involved in an over-all course of conduct that is illegal, or that entails evasion of attempts to regulate the activity. The illegitimacy of the activity in general bars all appeals to honest legal mistake that might otherwise be permitted. Ignorance of the fine points of the law will help such an accused no more than it does an individual charged with a traditional *mala in se* offence. In short, it is only if the over-all intention and project is clearly legal, that "mistake" of any sort is in general available to negative *mens rea*. Sexual activity has been regarded as a legitimate social activity that does not require strict legal regulation unless persons requiring special protection — such as minors — are involved. For this reason, mistakes made in the context of a sexual encounter traditionally have not received the treatment given mistakes made in the course of an illegitimate activity or raised in defence by a person charged with a traditional *mala in se* offence. This may also explain why the facts in *Sansregret v. R.*, [1985] 45 C.R.

may be found either to lack credibility, or to confirm the existence of criminal disregard for the law and other persons whose interests the law is designed to protect.

Analysis of mistake with respect to those provisions in the Criminal Code that are based on traditional crimes, those often referred to by the now outdated and therefore somewhat misleading label *mala in se*,<sup>147</sup> takes the approach just described. The underlying assumption is that everyone knows that causing serious harm to the life or well-being of other persons is wrong. Mistakes of law or mixed fact and law are therefore easily found to be irrelevant when an offence causing serious harm to a person is at issue. Failure to appreciate that such an act was wrong will not be found credible in most cases. When it is credible, it is usually grounds for finding the defendant to be reckless or insane.<sup>148</sup>

At the other end of the traditional spectrum of seriousness lie what are often referred to as *mala prohibita*, creations of positive law. These offences often do not correspond to any established and traditional customary norms and the behaviours that they prohibit may therefore not be generally thought to be *prima facie* criminal. Here the relative obscurity of a particular legal provision, rather than an overtly callous or reckless disregard for the law and the interests it is intended to protect, will often be the immediate "cause" of an accused person's "ignorance" of the law.<sup>149</sup> As we saw above, the practice of Canadian judges is to apply section 19 in such cases, convict, and then, when appropriate, recognize the absence of intentional and malicious disregard for the law by absolute discharge or the imposition of a minimal penalty.<sup>150</sup> A reasonable mistake, made in good faith, will ordinarily receive such treatment by judges.<sup>151</sup>

More problematic are those cases involving serious offences, *mens rea* offences, whose legal definition incorporates an element that is not identical to the common social definition of the same element, or that is identical to *one* of a *number* of commonly used definitions each of which is slightly different from the others. These offences are "true crimes," but there is no unanimity in the community as to what constitutes commission of the offence. Thus though everyone would agree that *X*, whether it be sexual assault or fraud by use of public or political office, is a crime, a random opinion poll in the community would not elicit a uniform definition of *X*. It is with respect to this category of

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(3d) 193 (S.C.C.), were not characterized as giving rise to issues analogous to those decided in *Natarelli*, [1967] S.C.R., 539-546, in which it was held that there is no colour of right defence available in extortion.

147. See Reference re Section 94(2) of Motor Vehicle Act, R.S.B.C. 1979, c. 288 (1985), 48 C.R. (3d) 289 (S.C.C.), reasons by Wilson, J., at 328 for a review of the origins, use, and abuse of the terms *mala in se* and *mala prohibita*.

148. Recklessness is consistent with a general disregard of the facts and for whether one's conduct conforms to the law. By contrast, section 16 deals with lack of capacity to appreciate the significance of conduct in the circumstances and to know when a choice to act in a particular manner is wrong.

149. Closely related is lack of general knowledge of the risks posed for protected interests by activities that may be pursued by non-experts. See the section on *mens rea*, mistake, and advertence.

150. See note 21.

151. A pragmatist, taking the long view, must, it is submitted, reject this approach. See notes 22 and 139.

offences that Canadian judges in the past have been most apt to characterize *all* mistakes of law, and mixed fact and law, or application of the law to the facts, as mistakes of fact (save those mistakes specifically prohibited by the legal definition of the specific offences, as is the case, for example, where the mistake of law concerns the age of consent).<sup>152</sup>

In cases arising in this category of offences, the accused may have disregarded or failed to ascertain or even advert to the existence, probability, or possibility of factual elements material to the offence because he was ignorant of a legal definition, or legal consequence, relevant in law to the situation or to the activity he was engaged in. An individual who does not know or misunderstands the law may neither recognize the legal significance of certain facts of which he is aware, nor appreciate the potential legal significance of those other facts pertaining to the situation or activity that he is "aware in a general way of not knowing anything much about." Understandable though it is that judges have often been of the view (especially if most lay persons could have easily made the same mistake) that justice to the individual accused requires acquittal in these circumstances on the grounds that there was no "conscious wrong-doing" and therefore the requisite *mens rea* was absent, such acquittals are a simple failure to enforce the law.

This approach and the understanding of *mens rea* on which it is based confounds legal responsibility with moral responsibility.<sup>153</sup> The excuse that is relied on in such cases results from, or is ultimately caused by, ignorance of the law, and should no more negative *mens rea* than any *other* form of ignorance of the law. The ordinary man may not fairly be expected to appreciate the complexities of property law. As explained above, this was recognized at common law and, in turn, by statute in a number of sections of the Criminal Code. This has provided judges with statutory authority to acquit individuals who lacked awareness of wrong-doing because they were ignorant of some aspect of property law. No such statutory authority exists with respect to other *mens rea* offences that incorporate private law definitions and concepts. But as noted above, if an offence is serious (a *mens rea* offence, not a mere regulatory offence), *but* at the same time does not correspond to one of the traditional, elemental, *mala in se* crimes at common law such as murder, wounding, theft, or rape of another man's wife, judges have often permitted *mens rea* to be negated by a mistake of fact or of fact and law that would not have occurred, or if alleged would not have been credible, *but for* ignorance of the law with respect to one or more elements of an offence.

Section 19 of the Criminal Code is not invariably applied to bar an excuse based on ignorance or mistake of law in such cases. The judicial attitude clearly has been that ordinarily an individual who was not aware that his or her conduct was illegal should not be convicted of a *mens rea* offence. Only if the intentional conduct is found to involve moral turpitude do judges invoke the

152. See cases discussed in notes 143 and 144.

153. Legal responsibility is the basis for conviction. Moral responsibility and turpitude are factors to be taken into account in the exercise of discretion in sentencing. On the question of whether *mens rea* requires "conscious wrong-doing," see Sellars, Stern, and Smith, above note 18, above, note 11. See also the section on amending section 244 at the end of this article.

public policy arguments, so widely used in enforcement of merely regulatory provisions, which assert that the public interest requires that persons who engage in regulated activities know the law pertaining to those activities. Judicial views as to what constitutes moral turpitude, and what the public interest requires, do change, of course. When the public interest is seen to require enforcement of the law, mistakes are characterized as mistakes of law and do not excuse. Such shifts in judicial opinion are often preceded by a change in public opinion and prosecutorial policy. Judges decide cases, they do not make the initial decision to lay charges. The decision to prosecute a case involving a defence of mistake implies that a decision has been made by at least one prosecutor that the mistake either lacks credibility or "ought not" to provide an excuse for commission of the offence. The converse inference can be drawn as well: failure to prosecute implies belief either that the mistake is credible or that it "ought" to provide an excuse.<sup>154</sup>

### ***Mens Rea and Sexual Assault***

When the *actus reus* has been established and thus a sexual transaction has been found to be a sexual assault within the meaning of section 244 and section 246.1, 246.2, or 246.3, of the Criminal Code, the assailant, even if sane and sober, is not criminally responsible for the offence and liable to be convicted unless there is also *mens rea* with respect to each element of the offence including the absence of consent. If it is proven beyond a reasonable doubt that the assailant knew that the complainant had not consented, or that he was reckless or wilfully blind to that fact, conviction will follow because the requisite awareness of the relevant facts was present. Thus if the accused was *aware* of a refusal, or that no consent had been given, or that any consent was not voluntary, there is *mens rea* under section 244. The reason for the lack of voluntariness is not relevant. There is also *mens rea* if the accused is shown to have believed that "but for" the presence of one or more coercive influences there would have been no consent by the complainant. An actual *intent* to act as an agent to coerce need not be shown. When the complainant has done or said anything to give the accused notice of lack of consent, the accused who does not desist (perhaps because, like our hypothetical Mr. Ross, he believes "this is how women act — hard to get — that women never say what they mean anyhow, that it is all a provocative game") is at risk of being found guilty on the basis of recklessness or wilful blindness.<sup>155</sup>

154. It is submitted that for this reason publicly funded mechanisms to review the exercise of prosecutorial discretion must be established.

155. The recent decision of the Supreme Court of Canada in *Sansregret v. R.*, [1985] 45 C.R. (3d) 193, affirms the availability of wilful blindness as a basis for *mens rea* in the context of some sexual offences involving a defence of lack of awareness of non-consent. The decision may have a significant impact on the enforcement of the new sexual assault provisions of the Criminal Code. The facts of the case may appear bizarre, but the decision should prove to be a powerful precedent in the hands of the prosecutor faced with the typical male who has been socialized to ignore or disregard the significance of what women say. The difference between the hypothetical Mr. Ross and *Sansregret* is that *Sansregret* was *aware* that the complainant had viewed the previous similar incident as grounds for a complaint to the police and that charges probably would have proceeded had the parole officer not intervened. By contrast, Ross finds in his previous experiences only affirmation of his belief that the circumstances of

In those cases in which the defence is an honest but mistaken belief that the transaction was consensual, it is submitted that the mistake should provide an excuse negating *mens rea* under Canadian law *only* if the operation of section 19 is not triggered. If the defendant is found to have been ignorant of the law (example — he did not know non-consensual sexual transactions were offences or that “consent” is “voluntary agreement”), section 19 should operate to bar the excuse. Such a defendant could be both *aware* of the behaviour of the complainant and unaware (because of lack of knowledge of the law) that the behaviour was inconsistent with the presence of explicit or unequivocal implied consent in the strict sense of “voluntary agreement.” In such a case mistaken belief in the existence of a state of affairs that does not include non-consent should not excuse.<sup>156</sup>

The same result is required when the defendant misapplied the law to facts. Assume, for example, that the accused was aware that non-consensual sex constituted an offence, but did not appreciate that using threats to attempt to obtain compliance might vitiate any consent in law although he was aware that he was using threats that *were* causing fear. Failure to appreciate the legal significance of the use of threats should not excuse. Similarly, it is submitted, failure to apply the law to the facts should not provide an excuse. Assume, for example, that the accused simply did not reflect about the legal implications for consent of the fact that the victim was resisting fiercely even though he did know that in law without consent any sexual transaction was an offence. Such a failure surely cannot provide an excuse negating *mens rea*.

It might appear that social definitions of sexual assault would assist the accused in these examples to negate *mens rea*. It is submitted, however, that social definitions are relevant to the *mens rea* issue only in those cases in which the accused (unlike the accused in these examples) was *not* ignorant of the law and made what is primarily a mistake of fact, as such, not one of misapplication or non-application of the law. And furthermore, all social definitions and objective tests used to assess whether the defendant’s mistaken belief that the complainant consented was an honest mistake will, like those used to decide whether there was consent for the purpose of the *actus reus*, be ones that focus on questions of *fact* relevant to the legal definitions of voluntariness and consent, *not* ones based on rape-myths. A comparison of outcomes under the traditional and proposed approaches may be useful.

### *The Status Quo*

Assume the accused asserts that he believed that the complainant consented and that the consent was given voluntarily. If the accused used extreme violence, even most myth-based social definitions of sexual assault, *without* reference to the issue of knowledge of the law, would suggest that: (1) an assault did occur, and (2) the accused did not believe the consent was

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the encounter were fully consistent with “consent.” He has engaged in sexual activities under similar circumstances in the past and “never got charged with sexual assault before.”

156. *Mens rea* would consist of the intention to do the actions constituting the assault with awareness of the behaviour of the complainant. Failure to interpret that behaviour in legal terms because of ignorance of the law regulating sexual activity would provide no excuse.



voluntary or that he was reckless or wilfully blind. Less overt coercion would make proof of *mens rea* more difficult, if not impossible, in most cases. Use of no more physical or other force than is "normal" would lend credibility to the accused's assertion of honest belief and genuine failure to advert either to the possibility of non-consent or to absence of the requisite voluntariness in complainant behaviours that were consistent with consent. This approach is the one currently used in prosecution of sexual assault cases. Figure 1 in the introduction to this article contains additional examples.

#### *Proposed Approach:*

In the approach to prosecution of sexual assault cases proposed here, classification of the mistake relied on by an accused as one of fact or law is crucial. Further examples are provided above in figure 2 in the introduction.

#### Ignorance of the Law

If the accused was *ignorant* of the law or did not fully understand what it meant in the context of a social encounter (as, for example, when the accused explains he did not know that women *really* had a legal right not to comply, or that verbal refusal combined with unsuccessful resistance or submission was not the same as consent, or that a particular woman had a legal right to refuse), he is liable to be convicted, it is submitted, because section 19 bars an excuse negating *mens rea* on the basis of either ignorance or misinterpretation of the law or misapplication or non-application of the law to the facts.<sup>157</sup> In these circumstances, as long as the accused is shown to have been aware of what he was doing, aware of how the complainant was behaving described in empirical and socio-factual terms, and to have intended to do what he did in full awareness of these facts, a conviction will be the result when the *actus reus* has been proven beyond a reasonable doubt. Similarly failure by an accused to direct his mind to how the complainant is behaving will not ground an excuse negating *mens rea* when the failure to advert to the complainant's behaviour is accompanied by ignorance or misinterpretation of the law.<sup>158</sup> *Successful*

157. See note 35 and accompanying text.

158. Thus the approach taken in Gaumont, [1939] 2 K.B. 808, is rejected. It is more essential for effective enforcement of the sexual assault laws in Canada than it is in England that inadvertence to facts relevant to the issue of consent as a matter of fact not be permitted to ground a defence of honest mistake when the accused is ignorant of or misinterprets the law of consent; in Canada *inadvertence* to the possibility of non-consent as a matter of fact bars a finding of recklessness because subjective awareness is required to prove *mens rea*; see note 106. By contrast in Kimber, [1983] 3 All E.R. 316 (C.C.A.) (*obiter*), and in Pigg, [1982] 2 All E.R. 591, "recklessness" was interpreted, following Lawrence, [1982] A.C. 510, and Caldwell, [1982] A.C. 341, to be equivalent not only to action with awareness of a possible risk, but also to indifference and inadvertence to it in circumstances in which if any thought had been given to the matter, the risk would have been obvious. In Canada the same evidence could, of course, result in conviction if the trier of fact regarded the risk as so obvious as to render any claim of inadvertence not credible. See the section on *mens rea*, mistake, and inadvertence on the use of objective tests to assess credibility. The accused in Kimber appears to have been quite genuinely unconcerned, however, with whether the complainant consented or not. At trial, he stated bluntly: "I did not think about what was in her mind... I was not really interested in Betty's feelings at all." This is surely not an accused who could be convicted of sexual assault in Canada as long as subjective awareness of each element of a *mens rea* offence must be proven even when the lack of awareness extends to ignorance of the

*prosecution of cases involving ignorance of the law of consent as it pertains to sexual transactions should encourage the gradual abandonment by Canadians of those social definitions of sexual consent which are inconsistent with the legal definition.* The eventual result will be congruence between the legal and dominant social definitions of consent and sexual assault. The shift toward congruence will, in turn, affect both "sexual" behaviour and the interpretation of that behaviour by decision-makers at each point in the criminal justice system see figure 3.

### Knowledge of the Law

When the accused claims to have made a mistake with respect to an element of the offence that is a mistake of fact that "causes" the accused to make a mistake of fact and law, a defence of lack of *mens rea* will be available. Here there is no primary reliance on ignorance or misunderstanding of the law.<sup>159</sup> (See figure 2.) If the alleged mistake of fact is a "reasonable" one as measured by social experience and expectations, the defendant will be credible, and the result probably will be an acquittal on the ground of lack of *mens rea*. If the mistaken belief appears unreasonable, not one which other people would make in the same situation, the result will turn on the credibility of the accused and whether there is an acceptable explanation for the mistake. If the alleged mistake of fact is too unreasonable for anyone, who *knew* that consent, voluntariness, and agreement were the key issues in law, to claim to have made (in the circumstances and with awareness of the other facts the accused did have) and still remain credible, the accused probably will be convicted on the grounds of intent, recklessness or wilful blindness. (See figure 2.)

### Consequences of the Distinction

*Social definitions of sexual assault, often based on myth, have no relevance for the determinations of criminal responsibility in cases involving ignorance of the law. In all those cases, because there is reliance on a mistake of law, or misapplication, or non-application of law, section 19 pre-empts and determines the issues of criminal responsibility.* Thus, although at present the criminal justice process places heavy reliance on myth-based social definitions of sexual assault that often focus, to the exclusion of all other considerations, on the type and degree of force used by the assailant, the arguments presented here suggest that *in law*, as a direct consequence of section 19, social definitions are relevant, strictly speaking, only to those cases in which the accused was *not* ignorant of the law and made a mistake of fact, which "caused" the accused to make a mistake of fact and law. Even within that category of cases the very assertion, or in its absence, emphasis on the presumption that the accused *did* know the law, will prevent the defence from obtaining assistance from social definitions that have wide currency at present precisely because, on

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law as it is apparent that it did on the facts in Kimber, [1983] 3 All E. R. 316 (C.C.A.). In short, it is *only* with the approach proposed in this article that a "Kimber" could be properly convicted of sexual assault in Canada.

159. See note 122.

examination, they are invariably seen to be patently inconsistent with the strict interpretation of the legal definition of consent developed in the section on consent, submission, and sexual assault.

In the second category of cases, in which the accused knows the law of consent, the matters of fact, knowledge of which would be relevant to a determination of *mens rea*, are ones that have not been the focus of social definitions of sexual assault in the past. Those myth-based social definitions have emphasized violence, quantum of force used, and situational factors as a basis for inferring that consent probably was, or was not, present. An approach to enforcement of the law of sexual assault that gives consent the central role that it is submitted consent must be given will stimulate the development of new social definitions and norms with respect to consent and sexual assault which are more congruent with the legal definitions. The new social definitions will emphasize unequivocal communication and will reflect a new awareness of situational factors related to inequality in socio-economic power as indicative of the possibility that the behaviour of the less powerful individual is not voluntary.

It is further submitted that in cases in which the defence consists of lack of awareness of the law or of the legal significance of non-consent (a "blank mind" with respect to these issues), conviction must be the result just as it would be *in any assault case* if such a defence were put forward. Above it was argued that if the accused was ignorant of the law or misapplied it and claims he knew what he was doing described in empirical-factual terms, but "did not know he was doing anything wrong," Section 19 bars a defence of excuse. Here it is argued that when the accused is shown to have *known* what the law is and yet to have failed to advert to the absence of consent or the requisite voluntariness, that is, failed to apply the law to the facts, conviction must be the result in all cases in which the accused is found to have been sane, and aware of what he was doing and how the complainant was behaving described in factual terms.<sup>160</sup> To allow an excuse to negative *mens rea* in *this* particular category of cases, but not in those cases in which the accused knew the law but *misapplied* it to the facts, would require that there be a meaningful distinction between misapplication and non-application of the law. Such a distinction is not tenable. It would require acceptance of the proposition that although an error in applying the law

160. In many cases, when the defence was lack of advertence to non-consent and the accused claimed to know the law, the accused would simply lack credibility and be convicted on the ground of intent, recklessness, or wilful blindness. The category of cases we are concerned with here are those in which the trier of fact believes that the accused actually did fail to advert to the consent issue even though he was not ignorant of the law and was aware of what he was doing and how the complainant was behaving described in factual terms. The distinction between the accused who is wilfully blind and the accused who fails to apply known law to known facts at first may appear slight in practice and of interest primarily to the theoretician. Such is not the case. The former is deliberately blind to facts which are accessible, a culpable failure to exercise capacity. The latter is either very lazy (also implying choice not to exercise capacity) or qualifies for classification under section 16 of the Criminal Code as a person who is "incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong." Therefore, in the absence of a finding of insanity, failure to apply known laws to known facts would appear to be a culpable omission, not a basis for a defense of excuse. Some defendants might be well advised to plead guilty and avoid a detailed examination of just why it was they "did not know they were doing anything wrong."

to the facts is no more excusable than ignorance of the law, simple failure to apply known law to known facts is an excuse for commission of an offence. That would be illogical. Therefore, inadvertence to the legal issue of consent, the "Gee-Whiz, ... I never stopped to think about it" response, whether it flows from ignorance of the law, misapplication of the law, or non-application of the law, must be seen to be tantamount to no defence whatsoever to a charge of sexual assault. This must be the result whether the lack of awareness extends only to matters of mixed fact and law relevant to the issue of consent or to the law of consent, as well.

### *General Application of the Argument*

Applied to criminal law in general, this argument implies that to be ignorant of the law that characterizes one's intentional and voluntary acts as criminal offences is to be liable at criminal law if those acts constitute the *actus reus* of an offence (unless the definition of the offence specifies that the act must be committed with awareness of its illegality). This has always been the case for traditional crimes corresponding to *mala in se*. Ignorance of the law is here understood to encompass ignorance of general law as well as misapplication and non-application of the law to the facts. Ignorance of the law in *all* of its guises must be barred as a defence for *all* offences, unless otherwise provided by statute, if full implementation of positive criminal law that established by statute, not by tradition or community or personal beliefs about what is a crime is to be achieved.<sup>161</sup> Failure by judges to apply section 19 to all cases has been an effective way to protect selected defendants from the consequences of their failure to know, apply, or advert to the law. That would be appropriate if the principle of "rule of law" contained a general exemption clause for particular offences or offenders. It does not. The judicial practice therefore can only be seen as a bare failure or refusal to enforce the law. This practice must cease.

### *Colour of Consent: Amending Section 244*

Precedent for a statutory exception to section 19 is provided by the colour of right defences to property offences. Historically the dependent status of women often made an analogy between proprietary rights and rights of sexual access to females appropriate. The analogy was appropriate insofar as women were chattels. As a consequence, it was quite natural to view *mens rea* in the context of property offences and sexual offences as involving the same issues

161. There is nothing inherently unfair to the accused in this proposal. As suggested above, mitigating circumstances may be taken into account at sentencing as long as the goals of the criminal law are not thereby defeated. Further statutory exceptions can be created insofar as this is actually justified with respect to particular offences. Offences can be redefined to minimize potential misunderstanding by the public as to what does constitute a violation of criminal law. Unlike the use of classification of mistakes as ones of fact rather than law to bypass section 19 and acquit the accused, these three approaches can be combined and used to protect the interests of the individual accused, while yet not sacrificing the collective interest in effective enforcement of the criminal law. Of the three, it is the clear definition of offences and the education of the public with respect to the criminal law that should be given priority. Without clear notice to the public of what constitutes an offence, the criminal law cannot have a preventive, deterrent effect.

subject to the same analysis. Law has been flying in the face of history for some time now, however, and, although the socio-economic conditions under which women live still often place them in a *de facto* chattel condition, in law women are not chattels, they are *not* the object of proprietary legal rights. It is also now clear as a matter of law that consent not contractual arrangements determines whether a sexual transaction is assaultive. This rule applies universally in Canada and extends to relationships of prostitution and marriage.<sup>162</sup>

The law of sexual assault protects personal rights of physical integrity, not property rights. Any diminution of the measure of effective protection given personal rights by the Criminal Code by tacit adoption of a property law analogy in judicial interpretation of the sexual assault provisions would *now be* evidence of an outrageous category mistake,<sup>163</sup> even though in the past it would

162. See note 14, for the text of section 143 of the Criminal Code, R.S.C. 1970, c. C-34, which excluded a male person's wife from the class of persons a male person was prohibited from raping. Section 143 was repealed and replaced in January, 1983, by section 224 (note 14) which extends protection against "rape" and all other forms of sexual assault to the wives of sexual assailants. As a consequence of the amendment, wives have protection of the criminal law from sexual assault equivalent to that which all other persons have. The marital relationship no longer provides immunity from criminal prosecution for sexual assault by either party to the marriage. The lawful remedies available to a party who is refused sexual access are negotiation, separation and divorce. But, as was discussed by Christine Boyle prior to the amendments referred to above, under conditions of relative socio-economic inequality between males and females in Canadian society, wives are arguably not sufficiently in control of their own lives to engage in negotiation as equal partners or deal with the possibility of being divorced for non-submission in sexual matters as anything but a serious threat to their economic well-being. These factors, combined with the social conditioning that females are subject to in this society, may place husbands in a position to exercise influence that is coercive, in the full sense of the word, in its effect, while appearing to exercise no power. Christine Boyle states: "[R]ules which define coercive sexual intercourse between strangers *may* not be useful where there exists a close relationship between victim and rapist. Here it may be necessary for the law to recognize the effect of special pressures arising out of the relationship. It is possible that a husband might be appropriately labelled as a rapist where a stranger would not," Boyle, "Married Women," 203. The approach to consent I have proposed in this article is designed to deal with special problems, such as this, arising out of lack of equality in effective bargaining power that could otherwise render the new Code provisions, extending protection to wives, ineffective. Women living in common-in-law relationships are, if anything, more rather than less, subject to coercive influence stemming from socio-economic factors. This is particularly true if they have dependant children and will continue to inhibit women from invoking the criminal law on their own behalf as long as orders for child maintenance are unrealistically low and difficult to enforce and public support for dependant children remains below the poverty level. A sexually abused woman, like a battered woman, is unlikely to seek protection by criminal law unless she has no other viable alternative.

In the case of women who work as prostitutes, just as was seen to be the case with wives who lack economic independence, whether consent to sexual acts is ever, strictly speaking, voluntary agreement in the full sense, is debatable. Either may have dependant children and perhaps a drug habit. See *R. v. Bulmer, Illingworth and Laybourn* (1983), 10 C.C.C. (3d) 256 (B.C.C.A.). However, it is clear that when a prostitute refuses consent for any reason, including failure of a customer to pay the price she requires in exchange for her services, she (or he) is protected by section 244. It may be inferred that a contract for sexual services will not provide immunity from prosecution for sexual assault if consent is withdrawn prior to performance of the services specified under the contract. See also note 171.

163. Colour of right arguments, and all those arguments that are analytically indistinguishable in form from colour of right arguments in that they utilize a defence of mistake of mixed fact and private law, constitute such a category of mistake when they are raised in the context of sexual assault. The physical autonomy of persons is no longer subject to private law exceptions. The physical autonomy of minors, mental incompetents, and persons lawfully detained is qualified by statute only with respect to custody, care, and control not with respect to sexual contact.

have been merely an accurate reflection of legal arrangements. Therefore tradition must be rejected as a basis on which to argue in support of a colour of consent exception to section 19 for the offence of sexual assault.

However, justice to persons accused of the offence of sexual assault is a paramount concern. The requirement of *mens rea* has a central role in criminal law, as it is now structured, in ensuring that persons who are charged with serious offences will be dealt with “justly” as we have come to understand that term in the penal context. The history of the doctrine of *mens rea* at common law and its continuing influence on interpretation of statutory criminal law is reviewed in the recent reasons for decision by the Supreme Court of Canada in *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*.<sup>164</sup> Approaching analysis of the problem at hand in that case — whether mandatory imprisonment for conviction of an absolute liability offence is a violation of section 7 of the Charter of Rights and Freedoms — from different angles, both Madame Justice Wilson and Mr. Justice Lamer conclude that imprisonment cannot be automatically imposed *solely* on the grounds that the accused committed the *actus reus*. The accused may not have violated the law knowingly and may have exercised due diligence. The reasons for judgment written by Lamer, J. and concurred in by four other members of the court, imply that fundamental justice requires that no one be imprisoned unless he or she has had an opportunity to challenge the validity of the inference from the fact that he or she committed the *actus reus* of the offence to the conclusion that he or she is criminally responsible. The court has thus affirmed the long-standing “revulsion against punishment of the morally innocent.”<sup>165</sup> And, as Madame Justice Wilson observes in her separate concurring reasons, although concern with the mental state of the accused is only a relatively recent phenomenon in English criminal law,<sup>166</sup> modern Canadian case law leaves no doubt but that liability to conviction of any “true crime” is presumed to require proof of *mens rea*.<sup>167</sup> Furthermore, in the absence of a legislative provision to the contrary, liability to imprisonment on conviction has been taken to be a reliable indicator that the offence is a “true crime” and *mens rea* is required for conviction.<sup>168</sup>

As was seen above, however,<sup>169</sup> in the case of offences that correspond to traditional *mala in se* offences, the mistake of law issue has not been seen to be relevant even though this might appear to permit conviction of the “innocent.” Everyone is presumed to know that causing certain types of harm is “wrong.” An assertion of mistake of law or of mixed fact and law is apt to be rejected as lacking credibility, or seen as evidence of recklessness or insanity, or as a mere

164. *Reference Re Section 94(2) of Motor Vehicle Act*, R.S.B.C. 1979, c. 288 (1985), 48 C.R. (3d) 289 (S.C.C.).

165. *Ibid.*, 319 Lamer, J., citing Dickson, J., as he then was, writing for the court in *Sault Ste. Marie*, [1978] 2 S.C.R. 1299, at 1311. And note that Dickson, J., in this context, does not use the distinction proposed above. See note 153 and accompanying text for a discussion of the distinction between legal liability and moral responsibility.

166. *Ibid.*, 327-28.

167. See note 120.

168. *Ibid.*

169. See introduction, notes 146, 147, 148, and accompanying text.

technicality that does not alter the finding of criminal intent.<sup>170</sup> Regulatory offences (*mala prohibita*), by contrast, were seen to require conviction, even of the “innocent” accused who acted in complete ignorance of the prohibition or was mistaken as to its application, to maintain the enforceability of regulatory provisions. In both cases it is *policy* which determines that the accused, unless insane, shall be presumed to know what the law is and to be capable of applying it to his or her situation. *Reality* the fact that the accused may not know or understand the law *is denied to permit conviction*; conviction serves to assert the authority of law and the culpability of *all* those who ignore it, by conscious choice *or* by ignorance.

It is submitted that the sexual assault provisions of the Criminal Code are, in effect, a hybrid of elements, some of which correspond to elements of those offences traditionally classified as *mala in se* and some of which correspond to elements of *mala prohibita* offences created by positive law. All *behaviours* that were prohibited under the traditional offence of rape are still prohibited under the sexual assault laws. In addition, by a series of amendments and enactments, positive law has: (1) expanded the category of situations in which behaviours of the *type* that were the subject of the offence as traditionally defined will be an offence by removing all exceptions to the general legal definition (such as the exception that existed between a husband and his wife);<sup>171</sup> and (2) *defined* sexual assault by reference to *consent* (not by quantum of force used, which was the criterion traditionally invoked by the term “rape”), thus contingently expanding the *type* of behaviours that are prohibited.

Social definitions of sexual assault<sup>172</sup> that have general currency still appear to be closer to the traditional concept of rape, which emphasized violence and the absence of a right or privilege based on relationship, than they are to the current legal definition.<sup>173</sup> This dissonance or lack of congruence between legal and social definitions obviously makes it more likely that some, perhaps many, individuals, who are neither insane or mentally incompetent, will commit sexual assaults and yet not appreciate either that what they are doing is wrong or illegal in that it constitutes the *actus reus* of a criminal offence.

At the same time sexual assault appears to have most of the stigma of the traditional offence of rape (although this is unclear and may change as a consequence of the more encompassing definition under the new legislation which includes forms of sexual contact other than intercourse, *per se*) and is regarded as a serious offence.<sup>174</sup> Conviction carries the risk of substantial

170. See notes 143-146 and accompanying text.

171. Removal of the exception with respect to wives may appear to be innocuous, a simple matter of removing a historical relic from the statute books. I would argue that it is actually of major significance, however, not only for wives, but for women in general. The bare existence of the exception, though only with respect to those women in a particular legal relationship, provided support for the view that any relationship of social or economic dependency legitimated unrestricted sexual access by the male or dominant party to the dependent party. As long as a marriage licence was a licence to rape, other less formal relationships could more easily be regarded as conferring the same immunity from sanctions.

172. There is no unanimity in society as to what *does* fall within the definition of “sexual assault;” see text at notes 44-54.

173. See note 14.

174. Enactment of the new sexual assault provisions removed the term *rape* and substituted the term *sexual assault* to refer to a wider range of sexual transactions than *rape* had. One can

incarceration and, when there is a basis for it, the further risk of being found to be a dangerous offender. There is no question but that sexual assault is dealt with by judges as a "true crime" and not as a "mere regulatory offence"; hence the judicial concern with *mens rea*.<sup>175</sup>

If there is to be effective enforcement of the sexual assault provisions, however, classification of ignorance, misinterpretation, or misapplication of the legal definition of sexual assault as mistakes of fact that negative *mens rea*, must be avoided. If it is not, the *malum prohibitum* or non-traditional, legislated, positive law aspect of the law will be neither generally known nor enforceable. Mitigation of sentence following rejection of a mistake defence and conviction must also be avoided, because sexual assault is not merely a regulatory offence, a *malum prohibitum*, despite its hybrid roots and modern statutory formulation. It is also a serious offence or "true crime" against a fundamental personal right protected by the state.

The re-definition of serious offences in terms appropriate to current social conditions cannot be effective to protect the fundamental social values that purportedly are the basis of the criminal law, unless at the same time we also re-examine our interpretation and use of the principles of criminal liability and eliminate those applications of these principles that are arcane and counter-productive. Section 19 gives positive law priority over private and traditional notions of right and wrong with respect to excuses. Canadian judges must do so as well and reject all types of mistake of law defences not specifically provided by statute. *Not* to do so is to avoid enforcement of positive law and to abandon rights the criminal law purports to protect. The comments of Mr. Justice Lamer about the *MacDougall* case and its implications for the issue in the *Motor Vehicle Reference* case<sup>176</sup> imply that the treatment of the distinction between mistake of fact and law in *MacDougall* is still good law and not inconsistent with the judgment in the *Reference* case. I suggest that Lamer, J., did not, even by implication, suggest that the conviction of a person, who acted "innocently" *only* in the sense of having placed reliance on a misunderstanding of the law, was constitutionally offensive. If I am right, this is equivalent to an affirmation that the requirement that everyone know the law is not "fundamentally unjust" and thus that my argument above that section 19 must be applied universally to all offences, if accepted, will not be subject to a successful section 7 challenge.<sup>177</sup> In the alternative, I suggest that if conviction of the "innocent," as

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only speculate whether the change in labels will have any impact on the enforcement process. If *rape* carried *more* negative stigmatizing connotations than *sexual assault* does, the change in terminology may result in less hesitation in charging and prosecution. At the same time, however, reduction in the stigma associated with the label may serve to trivialize the seriousness of the whole range of offences (bum-patting to rape with a weapon causing serious bodily harm) and reduce the deterrent effect of the threat of conviction. On sentencing under the new legislation, see *R. v. Kergan* (1985), 47 C.R. (3d) 321 (Alta. C.A.) and *R. v. Sandercock* (1985), 48 C.R. (3d) 154 (Alta. C.A.).

175. See notes 120 and 124.

176. See note 164 at 323-325.

177. Adoption of the Charter estoppel argument proposed in note 120 to deal with mistakes of law of the type analysed in the *Reference* case (those "caused" by design or operation of the system of administration of justice and not by any fault on the part of an accused), would make it far easier to reconcile the *Reference* case and *MacDougall*. As it is, the *Reference*



a consequence of the application of section 19 to bar a *mens rea* defence based on mistake of law, misapplication, or non-application of the law, is found to be *not* in accord with the principles of fundamental justice, it will be found to be reasonable and demonstrably justifiable under section 1 of the *Charter*.<sup>178</sup>

But laws that are too complex or obscure to be understood by ordinary persons who are affected by them may form an exceptional class such that conviction under these specific laws would constitute a violation of the *Charter*.<sup>179</sup> That is, in effect, the question posed above for the offence of sexual assault, as such. If the ordinary person cannot be expected to understand the law of consent and apply it with certainty in ordinary social life, it may be unjust to convict in the face of honest reliance on a misunderstanding of the law or the law as it applies to the facts.

Earlier I rejected reliance on any analogy between property offences and sexual offences that purported to be based on an analogy between the types of rights at issue in the two types of offences. There are further grounds on the basis of which the two types of offences can be distinguished.

First, it is not without significance that people who are made the objects of sexual assault can talk. Things, the objects of property offences, cannot talk, or communicate in any other way, although their owners can. The requirement that sexual transactions be preceded by communication between the parties with respect to consent is not particularly onerous. Mutual exchange of explicit or unequivocal implied consent will protect the parties to any subsequent sexual transaction from prosecution as long as the circumstances in which consent is given are not ones which vitiate consent and the transaction is the one to which parties agreed. In each case the critical questions would be, simply: "Did the other person agree to participate in a transaction of this nature? Do I have any

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case and MacDougall are only consistent with one another if one distinguishes between a misunderstanding of the law as it applies to known facts and lack of knowledge of the legal characterization of known facts that is a consequence of a judicial or administrative act of which the accused is not aware. If this distinction is made, it would appear that only some, not all, of the three classes of persons subject to section 94(2) would have been dealt with contrary to section 7. And, furthermore, those who were could have: (1) challenged section 94(2) under section 7 on the grounds of lack of notice; or (2) used a *Kilbride v. Lake* [1962] N.Z.L.R. 590 argument to suggest that without notice of suspension or of an act giving rise to suspension, voluntariness required to establish the *actus reus* was absent; or (3) adopted the argument presented in note 122 above to characterize the mistake as to the legality of what one was aware of doing (driving) as one "caused by" a mistake of fact (belief that no operative judicial or administrative act had occurred) and thus providing a basis for a defence of lack of *mens rea* which could not be barred without contravention of section 7. In short, the reasons in the Reference case probably should be interpreted with caution insofar as they deal with lack of knowledge of the illegality of what one is doing and penal liability and its prerequisites. Many questions remain open.

178. Note that this is possible only if Madame Justice Wilson's approach to analysis of the relationship between section 7 and section 1 of the *Charter* is not ultimately adopted in preference to that used by Mr. Justice Lamer. See Reference re Section 94(2) (1985), 48 C.R. (3d) 289. In the alternative, either section 15(2) could be invoked or section 33 could be used by Parliament to override the *Charter*.

179. The *Charter* estoppel argument proposed in note 120 could be applied to block prosecution under obscure or unduly complex laws, as well as in those cases in which the accused could show some evidence of reliance on state authority for information about the requirements of the law or lack of effective notice of the occurrence of a judicial or administrative act that had implications for the legality of his activity.

reason to believe that his or her agreement was qualified or may not have been freely given?"

With such an approach, few mistakes with respect to consent would be made. Those mistakes with respect to consent that were made as a consequence of misunderstanding of what constitutes agreement or voluntariness in law, or what factors vitiate consent in law, would be classified as mistakes of law and conviction would be required.<sup>180</sup> But reliance on unequivocal communication, rather than interpretation of other forms of behaviour to indicate consent, combined with avoidance of use of the force or influence of any kind in the negotiation of sexual transactions, will eliminate most situations in which

180. The practical result achieved by use of the approach proposed in this article is to require mutual explicit consent in all sexual transactions. It should be noted that the legislatures in a few of the states in the United States have enacted legislation in the last few years that moves in the same direction.

As of 1982 the Minnesota Criminal Code, Minnesota Statutes Annotated, subsection 609.341(4), stated: "'Consent' means a voluntary uncoerced manifestation of a present agreement to perform a particular sexual act." At the same time non-consent is not made an element of the offence of rape, but by implication consent is a defence. Some confusion has accompanied implementation of the new provisions, thus confirming that process is as important as the law to be applied. By contrast, the Michigan legislation omits reference to consent or resistance and defines rape solely by reference to force or coercion, thus targeting for all practical purposes only those sexual offences involving clear evidence of the use of physical force. Concern with self-determination in all sexual encounters, even in the absence of physical harm, as such, thus was not reflected in the legislation. This outcome, which follows the Model Penal Code approach, appears to reflect what I have characterized as the "traditional" social view of rape that it is distinguished from consensual sex by the type and quantum of force used rather than by the absence of consent, and which I have repudiated because it fails to recognize and protect individual liberty in the affirmative sense and disregards the victim as agent. Opinions about these issues differ, however. See, for example, Tchen, "Rape Reform and a Statutory Consent Defence," 1547.

Washington Revised Code Annotated, subsection 9A.44.010(6)(1982) states: "'Consent' means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse." The Washington legislation avoids exclusive focus on force by defining third degree rape without reference to force. Thus the section requires only that "the victim did not consent... and such lack of consent was clearly expressed by the victim's words or conduct." Subsection 9A.44.060. This provision is intended to extend protection by the criminal law to the individual's right to refuse even when no force can be shown to have been used. But confusion has resulted from continued use of victim resistance to demonstrate lack of consent in first and second degree rape, and as a consequence, few third degree rape cases have been prosecuted under the new legislation.

The success story comes from Wisconsin, where the process and the judges have not frustrated implementation of a statutory scheme that is itself coherent. Wisconsin Statutes Annotated, subsection 940.225 (West 1982) states: "'Consent'... means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact." Lack of consent and force are both elements of the offence in Wisconsin, but resistance is not required to demonstrate non-consent. In Wisconsin, *no* means *no* and anything less than *yes* or the unequivocal non-verbal equivalent is just not sufficient to provide grounds for a defence. And this, of course, is precisely what the approach proposed in this article requires in practical terms with respect to consent. However, my approach achieves that result *without* the need for legislation, *without* inviting analysis of the offence as a "less serious offence of mere negligence" (for example in the "failure to avert" or "Gee Whiz, I never stopped to think about it..." situations), and *without* violating constitutional standards that require criminal defendants to be presumed innocent until proven guilty according to law, as would probably occur if the burden of proof on the consent issue were shifted. Compare Wiener, "Shifting the Communication Burden."

On the issue of consent in United States rape laws and reform legislation dealing with the matter of consent see Harris, "Towards a Consent Standard in the Law of Rape;" Tchen, "Rape Reform and a Statutory Consent Defence;" Marsh, Geist, and Caplan, *Rape and the Limits of Law Reform*; and Wiener, "Shifting the Communication Burden."

mistakes of law would place a participant at risk of conviction. And, although evidence of caution and reliance in good faith on a misunderstanding of the law would provide no defence against conviction, these factors could be considered at sentencing, in those *few* cases, if any, in which, on such facts, the *actus reus* could be proven. Thus although the traditional arguments that have been used to justify the creation of a statutory exception to section 19 for property offences on the ground that complexity and uncertainty of the law would otherwise entrap the average citizen acting in good faith, are technically available in the context of sexual offences, their force in this latter context is actually quite limited and on policy grounds, it is submitted, they must be rejected as grounds for creation of a statutory exception.

Second, commerce requires that individuals not be deterred by the risk of criminal prosecutions from dealing with property in good faith. Business efficiency would be reduced if each transaction involving a change of possession or care and control of goods was made only after legal consultation to preclude criminal liability. No parallel considerations exist in the sexual context. "Civilization" would most probably not come to a halt as a consequence of the requirement that communication between the parties with respect to consent precede sexual transactions.

But of course tastes differ and there may be individuals who claim to be unaware that the law stipulates that sexual transactions undertaken without consent or voluntary agreement by the other party are assaultive. Others, like the accused in the hypothetical example presented at the beginning of this article, may either not understand what constitutes voluntary agreement in law or may form a self-serving though honest belief with respect to what has actually been communicated by the complainant by discounting the significance of verbal refusal to participate in comparison to the perceived significance of other voluntary behaviours and even involuntary physiological behaviours. Others, like Mr. Kimber, may regard their victim's preferences as being of no importance.<sup>181</sup> These individuals will assert that their commission of the *actus reus* of sexual assault was innocent. Here the interest of the individual in avoiding conviction is in obvious conflict with the collective interest in promoting knowledge of and obedience to the provisions of criminal law. Whether the conflict is resolved in favour of the individual by the creation of a colour of consent exception to section 19, or in favour of the collective interest by application of section 19 to bar a lack of *mens rea* defence, must inevitably depend in the end upon consideration of the underlying public policy questions.

It is submitted that the question must be resolved in favour of the collective interest that everyone know and obey the law or be subject to the consequences of failing to do so. The burden imposed on the individual by such an approach in cases involving sexual transactions is actually minimal. However complex the law of consent itself may be, the parties to a sexual transaction can communicate with one another. Anyone who understands that *no* means *no*, that *maybe* does not mean *yes*, and that *yes* only really means *yes* if the other party believed himself or herself to have a real choice, can avoid commission of

181. See notes 87 and 158.

most acts that would constitute one of the offences of sexual assault. Lack of familiarity with obscure legal distinctions or fine points of the law of consent thus does not place the parties to sexual transactions at high risk of unwittingly incurring criminal liability.<sup>182</sup> Thus the considerations seen in the area of property offences are not relevant here. If an exception to section 19 were created for sexual offences, there would be equal reason to create such an exception for all serious offences that incorporate an element whose legal definition is not identical to the common social definition of the same element, or which is identical to only one of a number of commonly used definitions. Such an approach would only defeat the purpose of the criminal law.

Statutory criminal law cannot be effective to protect fundamental social values and individual human rights if it is not enforced. Section 19 gives positive law priority over private and customary notions of right and wrong. The presumption thereby enacted — that everyone shall be dealt with *as if* they knew the law — is required if the law is to be enforceable and effective. It is contrary to sense to premise the government of a country on the rule of law, enact countless laws to regulate conduct, state that ignorance of those laws is not a good defence to any offence, and then, by a series of statutory exceptions, provide that though persons who act in bad faith will be held liable for the commission of specific offences, everyone *else* can violate the law with impunity as long as they remain sufficiently ignorant of the requirements of the law to avoid any inference of guilty knowledge and bad faith. Notice that you will be liable for all offences that you commit, even if you do not appreciate that what you are aware you are doing constitutes an offence, is a powerful incentive to be informed about the law, and it regulates the activities you choose to engage in. In the face of such notice, ignorance of the law enacted to regulate the activities one chooses to pursue can hardly be said to be innocent, and the conviction of an individual who commits an offence under such circumstances is not unjust. It is in the public interest that individuals be deterred from pursuing activities that affect the fundamental interests of other persons unless they have knowledge of the requirements of the laws regulating those activities.

Therefore no special statutory exception to section 19 should be enacted for sexual offences. Other serious offences whose definitions incorporate elements or requirements that are different or more specific than those of customary community mores and practices should be re-examined in the light of the considerations discussed in this article. It is submitted that in most cases legislative amendment to simplify and clarify the requirements of the Criminal Code, combined with judicial discretion in sentencing, will suffice to protect the individual from “unjust punishment.”<sup>183</sup> In few, if any cases, in addition to those already recognized in sections of the Criminal Code dealing with property offences and custody of children, will the public interest be seen, on reflection, to be best served by permitting well-meaning but legally illiterate persons to

182. At the same time, it is clear that the proposed approach is designed to reward caution in initiating sexual transactions and to put those who disregard what their victims say at risk of conviction.

183. This is the practice now used in circumstances in which the mistake is not one for which the accused can fairly be held responsible, even though under section 19 a conviction must be entered.

pursue activities without risk of criminal liability for the harm which their activities cause.

Furthermore, exceptions to section 19 created by judges on a case by case basis only serve to abandon the very rights the criminal law purports to protect. Therefore the common judicial practice of selectively construing mistakes of fact broadly to encompass misunderstanding and misapplication of the law and inadvertence to the law, must cease. The practice is contrary to law, or illegal, in that it is *contrary to* the requirements of section 19 and is thus not authorized by section 7(3).<sup>184</sup> It is often used selectively in reliance on criteria of moral turpitude and innocence that are themselves private, not authorized by law.<sup>185</sup> It is therefore clear that this judicial practice also violates section 15 of the Charter of Rights and Freedoms in that it constitutes an unauthorized departure from the rule of law and thus denies equal protection and equal benefit of the law to persons who rely on the criminal law to protect their fundamental interests.

This conclusion pertains both to the criminal law in general and to the sexual assault provisions in particular. Personal physical integrity *is* a protected interest. Sexual assault *is* a paradigmatic denial of personal autonomy. Individual liberty *is* at issue here. The choices are clear. Either judges and the criminal justice system will continue to use an analytic approach that condones sexual assault, or they will enforce the law and affirm the right of the individual to exercise self-determination in the negotiation of sexual transactions. Are we to have rule by custom or rule by law? Oppression and degradation, or liberty and personal autonomy? Choose one more time — but choose well.

184. See note 6.

185. See notes 144-46.

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