Pappajohn: Safeguarding Fundamental Principles

In *R. v. Pappajohn*[1] six of seven judges in the Supreme Court of Canada held, in a dramatic rape case, that an honest, unreasonable mistake as to consent is a valid defence. This ruling unambigously applies to all *mens rea* offences. I shall argue that it was predictable and correct, and that the approach through general principles was the best one.

I. Background

In England two severe nineteenth-century decisions which shaped the law of mistake of fact are only now being challenged in that country, though not yet overruled. In *R.* v. *Prince*[2] the accused was charged with the statutory offence of abduction of an unmarried girl under the age of sixteen. The evidence was that he had reasonable grounds to believe that she was eighteen. An overwhelming majority (15-1) in the Court of Crown Cases Reserved decided that the offence was one of absolute liability in which mistake, however reasonable, could not excuse. In *R.* v. *Tolson*,[3] the same court was asked to decide whether a mistaken belief that her husband was dead at the time of a second marriage should afford a defence to a woman facing a statutory charge of bigamy. Section 5 of the *Offences Against the Person Act*[4] contained no express language requiring *mens rea,* but provided a defence to:

> any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last passed, and shall not have been known by such person to be living within that time.

The majority, following the opinion of Brett J., dissenting in *Prince*,[5] accepted that an overriding principle of *mens rea* applied to statutory offences in the absence of any indication to the contrary. The classic *dictum* is that of Cave J.:

> At common law an honest and reasonable belief in the existence of circumstances, which if true would make an act for which a prisoner is indicted an innocent act has always been held to be a good defence.[6]

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[1] (1980) 14 C.R. (3d) 243 (S.C.C.).

[2] (1875) L.R. 2 C.C.R. 154, fully discussed by Williams, *Criminal Law: The General Part,* 2nd ed. (1961), 177-201 and Cross, *Centenary Reflections on Prince's Case* (1975) 91 L.Q.R. 540.

[3] (1889) 23 Q.B.D. 168 (C.C.R.), discussed by Williams, *supra,* note 2, 177.

[4] 24-25 Vict., c. 100, s. 57 (U.K.).

[5] Overlooked by Dickson J. in *Pappajohn, supra,* note 1, 260.

[6] *Supra,* note 3, 181.

Yet this judgment, because it required that the mistake be honest *and* reasonable, introduced an objective test that severely limited the scope of the doctrine of *mens rea.* Oddly enough, it was never argued[7] that if the courts wanted a requirement of *mens rea* they should simply have recognized that a genuine mistake would excuse, however unreasonable. The Privy Council affirmed the test in *Tolson* that a mistake must be both honest and reasonable[8] and mechanically applied it to other offences as well as to bigamy.[9] Decisions that the mistake need merely be honest were comparatively rare.[10] The test in *Tolson* was also adopted in Australia where it is still authoritative.[11]

The House of Lords reviewed afresh the law on mistake in *D.P.P.* v. *Morgan,*[12] an appeal by four persons from convictions of rape. One of the accused invited three fellow R.A.F. officers to have sexual intercourse with his wife, saying that she was "kinky" and would pretend to resist. The main issue was consent but the trial judge also directed the jury that a *reasonable* mistaken belief in consent could excuse. By a majority of 3-2 the Law Lords concluded that this direction was wrong. On the substantive point, four Lords approached the matter as one of general principle and concluded that the *mens rea* for rape was either an intent to have sexual intercourse without the consent of the woman or recklessness as to her non-consent.[13] The test was subjective and this was inconsistent with the proposition that mistake must be reasonable. Although sympathizing with academic lawyers such as Professor Williams, who have criticized the objective test, Lord Edmund-Davies felt constrained to follow the ninety-year-old precedent of *Tolson.*[14] The other three Lords in the majority also showed

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[7] *D.P.P.* v. *Morgan* [1976] A.C. 182, 202 (H.L.) *per* Lord Cross.

[8] *Bank of New South Wales* v. *Piper* [1897] A.C. 383 (P.C. — from N.S.W.).

[9] There was a return to the absolute responsibility of *Prince* in *R.* v. *Wheat* [1921] 2 K.B. 119 (C.C.A.) (honest and reasonable belief in divorce was no defence to bigamy) until *Wheat* was reversed in *R.* v. *Gould* [1968] 2 Q.B. 65 (C.A.) in favour of *Tolson.* See also *Warner* v. *Metropolitan Police Commissioner* [1969] 2 A.C. 256 (H.L.) and *Sweet* v. *Parsley* [1970] A.C. 132 (H.L.).

[10] *Wilson* v. *Inyang* [1951] 2 K.B. 799 (D.C.) (falsely practising medicine) and *R.* v. *Smith* [1974] Q.B. 354 (C.A.) (wilful damage).

[11] *R.* v. *Thomas* (1937) 59 C.L.R. 279 (Aust. H.C.); see also Howard, *Criminal Law,* 3rd ed. (1977), 382-4.

[12] *Supra,* note 7. See the approving review by Williams, *Textbook of Criminal Law* (1970), 100-4; *cf.* the scepticism of Fletcher, *Rethinking Criminal Law* (1978), 699-706 and Pickard, *Culpable Mistakes and Rape: Relating Mens Rea to the Crime* (1980) 30 U.T.L.J. 75.

[13] *Ibid.,* 203 *per* Lord Cross; 209 *per* Lord Hailsham; 225 *per* Lord Edmund-Davies; 237 *per* Lord Fraser.

[14] *Ibid.,* 234-5.

an extraordinary preoccupation with precedent, carefully distinguishing *Tolson* so as to leave it intact:[15] for example, Lord Cross made it clear that in a statutory offence which did not have an express statutory requirement of *mens rea* he would apply the *Tolson* rule.[16] Why this would follow, and whether this was desirable, was not addressed. At least there is no ambiguity about the views of Lord Simon, dissenting. After reviewing the case law, which he treated as binding, he held that an honest but unreasonable belief would not amount to sufficient evidence to be put to the jury. Why, he asked, should a court concern itself with the reasonableness of the mistake?

> The policy of the law in this regard could well derive from its concern to hold a fair balance between the victim and the accused. It would hardly seem just to fob off a victim of a savage assault with such comfort as he could derive from knowing that his injury was caused by a belief, however absurd, that he was about to attack the accused. A respectable woman who has been ravished would hardly feel that she was vindicated by being told that her assailant must go unpunished because he believed, quite unreasonably, that she was consenting to sexual intercourse with him.[17]

Condemned by the media as a rapist's licence, the *Morgan* decision provoked a public outcry in both England and Australia [18] Governments in both jurisdictions soon asked law reform commissions and special study groups to review thoroughly all aspects of the law concerning rape. The various recommendations were far-reaching, but as regards mistake of fact no one has recommended that the ruling in *Morgan* should be changed. Indeed, in England, the ruling was finally expressly codified as follows:

> (1) [A] man commits rape if: (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b) at the time he knows that she does not consent to the intercourse or he is reckless as to whether or not she consents to it ... .
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> (2) It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that the woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.[19]

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[15] *Ibid.*, 202 *per* Lord Cross; 215 *per* Lord Hailsham; 238 *per* Lord Fraser.

[16] *Ibid.*, 202.

[17] *Ibid.*, 221.

[18] See the excellent review by Scutt, *The Australian Aftermath of D.P.P. v. Morgan* (1977) 25 Chitty's L.J. 289 and, in England, *The Report of the Advisory Group on the Law of Rape* (The Heilbron Report, Cmnd 6352 (1975)).

[19] *Sexual Offences (Amendment) Act*, 1976, c. 82. Pickard (*supra*, note 12, 92) reads this amendment as being ambiguous as to whether an unreasonable

For more than twenty years the Supreme Court of Canada has followed a distinct approach to the law of mistake, stemming from the judgments of Cartwright J. (as he then was) who, in a minority concurring judgment in *R.* v. *Rees*[20] and for the majority in *R.* v. *Beaver*,[21] qualified the *Tolson* test. According to Mr Justice Cartwright, the English decision of *Wilson* v. *Inyang*[22] rightly decided that:

> the essential question is whether the belief entertained by the accused is an honest one and that the existence or non-existence of reasonable grounds for such belief is merely relevant evidence to be weighed by the tribunal of fact in determining that essential question.[23]

This ardent concern to insist on the requirement of *mens rea* and on the subjective test was perhaps insufficiently articulated or justified in the reasons for judgment.[24] Yet Cartwright J.'s words cannot be rationalized as mere *obiter* or as failing to establish a generalized subjective approach to mistake.[25] In any event several decisions in Canada have required the mistake to be honest and reasonable,[26] but *Beaver* has often been accepted[27] and many cases[28] have held that a merely honest mistake will excuse in the case of a *mens rea* offence.

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belief will excuse. Her argument hinges on the decision not to define "recklessness". It is to be hoped English judges will not frustrate clear parliamentary intention and maintain the majority's subjective stance in *Morgan*.

[20] [1956] S.C.R. 640 (Nolan J. concurring) in respect to a mistake as to age relevant to a charge of wilfully contributing to delinquency: *Juvenile Delinquents Act*, R.S.C. 1952, c. 160, s. 33(1) [now R.S.C. 1970, c. J-3, s. 33(1)].

[21] [1957] S.C.R. 531.

[22] *Supra*, note 10.

[23] *Supra*, note 21, 538.

[24] See particularly Weiler, *In The Last Resort* (1974), 94: "One senses that Cartwright's defence of ... *mens rea* ... is very sketchy just because he believes the answer is obvious."

[25] See Pickard, *supra*, note 12, 85-9.

[26] See O'Halloran J.A. in *R.* v. *McLeod* (1954) 2 C.R. 281 (B.C.C.A.); Mackay J.A. in *R.* v. *McAuslane* [1968] 1 O.R. 209 (C.A.). Ritchie J. in *R.* v. *King* [1962] S.C.R. 746; *R.* v. *Finn* [1972] 3 O.R. 509 (C.A.); *R.* v. *Custeau* [1972] 2 O.R. 250 (C.A.) and *R.* v. *Woolridge* (1979) 49 C.C.C. (2d) 300 (Sask. Prov. Ct) (bigamy in the belief he was divorced).

[27] Only in the Supreme Court has this occurred: *e.g.*, for possession of lobsters (*R.* v. *Pierce Fisheries Ltd* [1971] S.C.R. 5); pollution (*R.* v. *City of Sault Ste Marie* [1978] 2 S.C.R. 1299); and driving while suspended (*R.* v. *Prue* [1979] 2 S.C.R. 547).

[28] *R.* v. *Davidson* (1971) 3 C.C.C. (2d) 509 (B.C.C.A.); *R.* v. *Kundeus* [1976] 2 S.C.R. 272, 278 *per* Laskin C.J.C. (dissenting on a different point); *R.* v. *Couture* (1977) 33 C.C.C. (2d) 74 (Ont. C.A.); *R.* v. *Vicko* (1973) 10 C.C.C. (2d) 139 (Ont. C.A.); *R.* v. *Chow* (1978) 41 C.C.C. (2d) 143 (Sask. C.A.) and *R.* v. *Prue*, *supra*, note 27.

II. Pappajohn

The controversy triggered by Cartwright J.'s decision in *Beaver* has become a matter of history since *Pappajohn*. The accused, a businessman, met with the complainant, a real estate salesperson, to discuss the pending sale of his house. After a three-hour lunch during which much liquor was consumed, the accused took the complainant to his house. Some three hours later the complainant ran naked out of the house with a bow-tie round her neck and her hands tied tightly behind her back by a bathroom sash. A neighbour, a priest, received her in an obviously distraught state. At trial the complainant denied any form of consent, testifying that she had physically and mentally resisted throughout. Pappajohn's testimony was the opposite: according to him, there had been preliminary love-play with her consent and acts of intercourse, again with her consent; the gagging and binding was done to stimulate sexual activity, and it was only then that she suddenly became hysterical and screamed. The trial judge ruled that there was insufficient evidence to leave the defence of mistake of fact with the jury.

A majority of the Supreme Court of Canada[29] affirmed this ruling:

> It would seem to me that, if it is considered necessary in this case to charge the jury on the defence of mistake of fact, it would be necessary to do so in all cases where the complainant denies consent and an accused asserts it. To require the putting of the alternative defence of mistaken belief and consent, there must be, in my opinion some evidence beyond the mere assertion by the counsel for the appellant of belief in consent. This evidence must appear from or be supported by sources other than the appellant in order to give it any air of reality.[30]

McIntyre J. held that there was an air of reality to the evidence in *R.* v. *Plummer and Brown*,[31] where the complainant had apparently consented to intercourse with the accused, although she was still under a threat previously made by another. Similarly, in *Morgan* there had been some evidence tending to explain the mistaken belief.

Mr Justice Dickson, having made it clear that it was immaterial whether the source of the evidence was the accused alone,[32] dissented on the ground that there was sufficient evidence to convey a sense of reality to the defence of mistake in respect of the acts of intercourse before the complainant was bound. The judge lists the following elements of circumstantial evidence:

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[29] *Per* McIntyre J., Pigeon, Beetz and Chouinard JJ. concurring: Martland J. also concurred on this point.

[30] *Supra*, note 1, 283.

[31] (1975) 31 C.R.N.S. 220 (Ont. C.A.).

[32] *Supra*, note 1, 262.

> (1) Her necklace and car keys were found in the living room. (2) She confirmed his testimony that her blouse was neatly hung in the clothes closet. (3) Other items of folded clothing were found at the foot of the bed. (4) None of her clothes were damaged in the slightest way. (5) She was in the house for a number of hours. (6) By her version, when she entered the house the appellant said he was going to break her. She made no attempt to leave. (7) She did not leave while he undressed. (8) There was no evidence of struggle. (9) She suffered no physical injuries, aside from three scratches.[33]

Although one readily sympathizes with the plight of a rape victim who must testify, and particularly a rape victim in a *cause célèbre,* it is difficult to construe the evidence as not surmounting the low hurdle required in order to leave the matter to the jury, where issues of fact properly belong.

On the more important substantive point, Dickson J.'s judgment becomes the majority. McIntyre J. specifically holds that the decision in *Beaver* precludes the interpretation of Lambert J.A., dissenting in the Court below, that the mistake would have to be a reasonable one.[34] He also expressly concurred with that part of Dickson J.'s judgment on the defence of "mistake of fact".[35] Martland J. in lonely dissent left the point open: the pronouncement in *Beaver* was *obiter,* he said, and the ruling in *Inyang* was not a general definition of the defence of mistake of fact.

Mr Justice Dickson's review of the authorities is somewhat cumbersome.[36] Yet the rest of the judgment is another outstanding example of this eminent jurist's attempt to expound a principled approach to Canadian criminal law. In the context of mistake he makes several important clarifications. First, the defence of mistake is simply a denial of *mens rea* which does not leave the accused with a burden of proof but merely requires that he adduce sufficient evidence to put the defence in issue:

> Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence. It avails an accused who acts innocently, pursuant to a flawed perception of the facts, and nonetheless commits the *actus reus* of an offence. Mistake is a defence, though, in the sense that it is raised as an issue by an accused. The Crown is rarely possessed of knowledge of the subjective factors which may have caused an accused to entertain a belief in a fallacious set of facts.[37]

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[33] *Ibid.,* 273.

[34] *Ibid.,* 277-8.

[35] *Ibid.,* 284.

[36] *Ibid.,* 252-68.

[37] *Ibid.,* 261. This implicitly reverses the majority view in *Kundeus* (*supra,* note 28) that there is a "rebuttable presumption of *mens rea*". It accords with the dissent of Laskin C.J.C. in that case: "If mistake is put forward in this context by evidence offered by or on behalf of the accused, it is only by way

Second, a requirement that mistake to excuse be both honest and reasonable is liability based on objective negligence, and is therefore not applicable to a *mens rea* offence like rape, but indeed a requirement in negligence cases:

> It is not clear how one can properly relate reasonableness (an element in offences of negligence) to rape (a "true crime" and not an offence of negligence). To do so, one must, I think, take the view that the *mens rea* goes only to the physical act of intercourse and not to non-consent, and acquittal comes only if the mistake is reasonable. This, upon the authorities, is not a correct view, the intent in rape being not merely to have intercourse but to have it with a non-consenting woman. If the jury finds that mistake, whether reasonable or unreasonable, there should be no conviction. If, upon the entire record, there is evidence of mistake to base a reasonable doubt upon the existence of a criminal mind, then the prosecution has failed to make its case.[38]

This analysis is logically imperative, assuming one accepts the *mens rea* definitions. Moreover, one can infer that, in respect of the well-known categories of offences outlined in *Sault Ste Marie*[39] for strict liability offences, a mistake to excuse must be reasonable with the onus on the accused, while for absolute responsibility offences, it would be axiomatic that a mistake of fact would be simply irrelevant.[40]

Third, there is no justification for the distinction made by Lord Cross in *Morgan* which would allow the defence of unreasonable mistake in statutory offences expressly importing *mens rea* but not in statutory offences which are absolute on their face. This rejection is welcome;[41] otherwise the fundamental question of blameworthiness would be determined by the vagaries of statutory draftmanship.[42]

Apart from these assertions of principle, Dickson J.'s judgment is also noteworthy for its discussion of policy issues. In the eyes of many, the law of rape needs to be reformed, particularly so as

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of meeting an evidentiary burden and raising a reasonable doubt that the Crown has met the persuasive burden of proof resting upon it" (p. 144).

[38] *Supra*, note 1, 264.

[39] *Supra*, note 27, 373-4.

[40] The decisions in *R.* v. *Custeau* (*supra*, note 26) and in *R.* v. *Finn* (*supra*, note 26), that an honest and reasonable mistake would avail in a case of absolute liability, cannot be sound.

[41] But see the similar approaches of Cross, *supra*, note 2, 547, Pickard, *supra*, note 12, 85, 91-2 and Martland J., *supra*, note 1, 251.

[42] A partial qualification needs to be made with regard to bigamy. S. 254 of the Criminal Code requires that bigamy where the second marriage was on the belief that the prior spouse was dead be only excused if the mistake was honest and reasonable. Other types of bigamy can be excused by an honest mistake alone. See *Woolridge*, *supra*, note 26.

to lessen the trauma suffered by the victim when the matter is dragged through the courts. In the court below, Lambert J.A., dissenting, raised arguments similar to those expressed by Lord Simon in *Morgan*:

> Why should a woman who is sexually violated by such a man have to defend herself by screams or blows in order to indicate her lack of consent, or have to consent through fear, for a charge of rape to be sustained? Surely a firm oral protest, sufficient to deny any reasonable grounds for belief in consent, should be a sufficient foundation in these circumstances for a charge of rape.[43]

Dickson J.'s careful response is worth quoting at length:

> I am not unaware of the policy considerations advanced in support of the view that if mistake is to afford a defence to a charge of rape it should, at the very least, be one that a reasonable man might make in the circumstances. There is justifiable concern over the position of the woman who alleges that she has been subjected to a non-consensual sexual act; fear is expressed that subjective orthodoxy should not enable her alleged assailant to escape accountability by advancing some cock-and-bull story. The usual response of persons accused of rape is: "She consented". Are such persons now to be acquitted simply by saying: "Even if she did not consent, I believed she consented"? The concern is legitimate and real. It must, however, be placed in the balance with other relevant considerations. First, cases in which mistake can be advanced in answer to a charge of rape must be few in number. People do not normally commit rape *per incuriam*. An evidential case must exist to support the plea. Second, if the woman in her own mind withholds consent but her conduct and other circumstances lend credence to belief on the part of the accused that she was consenting, it may be that it is unjust to convict. I do not think it will do to say that in those circumstances she in fact consented. In fact, she did not, and it would be open to a jury to so find. Third, it is unfair to the jury and to the accused to speak in terms of two beliefs, one entertained by the accused, the other by a reasonable man, and to ask the jury to ignore an actual belief in favour of an attributed belief. The mind with which the jury is concerned is that of the accused. By importing a standard external to the accused, there is created an incompatible mix of subjective and objective factors. If an honest lack of knowledge is shown, then the subjective element of the offence is not proved.[44]

Dickson J. concluded in effect that the debate on the reasonableness of mistake was a tempest in a teapot and that we should have faith in the ability of our jurors:

> Perpetuation of fictions does little for the jury system or the integrity of criminal justice. The ongoing debate in the courts and learned journals as to whether mistake must be reasonable is conceptually important in the orderly development of the criminal law, but, in my view, prac-

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[43] *Supra*, note 7, 212.

[44] *Supra*, note 1, 266-7.

> tically unimportant, because the accused's statement that he was mistaken is not likely to be believed unless the mistake is, to the jury, reasonable.[45]

Dickson J. should be commended for upholding general principles in the highly emotive debate concerning rape trials. While there is a clear need to improve the evidentiary and procedural rules in a rape trial, both pre-trial and during trial, it is also arguable that a substantive change denying the defence of unreasonable mistake would distort general principles and, perhaps more importantly, not benefit a rape victim. Scutt puts this view forcefully:

> 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 of 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 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.[46]

In general, the case for an objective standard in criminal law, although increasingly familiar,[47] is not overwhelming. We must always remember the fundamental notion that the criminal sanction is a blunt instrument and must be wielded with restraint.[48] The real danger in resorting to the objective standard is that it may be unthinking pandering to those who maintain, without offering evidence, that an extension of the criminal law is needed for reasons of law and order. In fact, the objective standard may well do more harm than good. Criteria such as "reasonable", "culpable" or "morally at fault" may amount to vehicles for personal whim or peevishness and run afoul of the fundamental *nulla poena sine lege* principle. The most notorious example of this kind of abuse is

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[45] *Ibid.*, 267.

[46] *Supra*, note 18, 296-7.

[47] See especially Fletcher, *supra*, note 12, 262-4, 504-11 and *The Theory of Criminal Negligence: A Comparative Analysis* (1971) 119 U. Penn. L. Rev. 401. In the Canadian context see Stuart, *The Need to Codify Clear, Realistic and Honest Measures of Mens Rea* (1973) 15 Crim. L.Q. 160; Gordon, *Subjective or Objective Mens Rea* (1975) 17 Crim. L.Q. 355; O'Hearn, *Criminal Negligence: An Analysis in Depth* (1964) 7 Crim. L.Q. 27 and 407.

[48] Law Reform Commission of Canada, *Report: Our Criminal Law* (1976).

the attempt to enforce obscenity laws, pornography being very much in the groin of the beholder.[49] The subjective approach, however, obliges us to judge the individual entirely on his own merits and his own thoughts. We should be cautious about convicting those who simply did not think or did not think well enough for whatever reason. This is not the place to rebut Professor George Fletcher's elaborate and all-encompassing thesis favouring a "normative" rather than "descriptive" approach to *mens rea*.[50] Let us merely note that, to the extent it minimizes the importance of the distinction between the objective and subjective approaches, it carries the very real risk of masking a carefree resort to the objective test which could operate as a tool of repression against the less fortunate. Moreover, a recognition that to excuse in a most serious crime like rape mistake must also be reasonable is to allow guilt to be established through proof of simple negligence alone. There should be very good reasons advanced for this extension of the grounds for culpability.

Finally, it seems wise to wait for Parliament to address these questions of re-definition and for Parliament to distinguish between crimes in which culpability is based on a subjective standard and those of a lesser culpability based on an objective test. This view is shared by Cross:

> one reason why the maximum punishment for rape is life imprisonment is that the common man considers rapists to be very wicked people. Someone who believes, albeit without reasonable cause, that the woman is consenting may well be stupid and insensitive, but he is not wicked in the sense in which the rapist is wicked. If there is a real need for it, let us have a new statutory offence of having sexual intercourse being negligent as to the woman's consent, but let us also consider carefully what the maximum punishment should be, and above all let us not call the crime "rape".[51]

We are rightly concerned with the victim of a crime. But we must also be concerned with the consequences of criminal conviction. Although most would agree that a convicted rapist needs severe punishment, we must remind ourselves that rape has a maximum penalty of life imprisonment, that rapists are invariably sent to penitentiary, most for a very long time, and have traditionally been considered dangerous when the question of parole comes to be considered. In this serious offence as in all other types of criminal sanctions, there is good reason to be mindful of using the force of the criminal law with restraint.

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[49] Rembar, *The End of Obscenity*, quoted in The New York Times Book Review, June 23, 1968.

[50] *Supra*, note 12.

[51] *Supra*, note 2, 552.

III. A new approach?

Dickson J.'s judgment in *Pappajohn*, and particularly his resort to the concept of recklessness, has already been severely criticized by Professor Toni Pickard:

> Now I think it undeniable that the relationship of mistakes to culpability is one of the central conundrums of criminal law. Working it through, in all its complexity, forces us to attend to the reasons for the ultimate stand-off between objective and subjective theorists. Conundrums of this nature should not — cannot — be resolved by mere definitional preference. Yet Dickson J. does nothing to anchor his preference in theory or authority. Nowhere in the judgment does he either give reasons, or refer us to reasons which justify his definition of recklessness by relating it to a coherent theory of culpability. Nor does he acknowledge or in any way attend to our large experience with other meanings of "recklessness" in ethical discourse, in lay language, in other areas of law, and in criminal law itself. ...
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> These defects are the defects of orthodoxy taking tenets to be self-evident and self-justifying, dissenting arguments to be superficial or non-existent. As a declaration of orthodoxy, *Pappajohn* will undoubtedly comfort the faithful. The sceptic must remain unpersuaded.[52]

In the main Pickard exaggerates. The judge who wrote the decision in *Sault Ste Marie* for the whole Court is not lacking in theory or authority and need not constantly re-assert his views. In *Pappajohn* Dickson J. faithfully reviews decisions from three jurisdictions which hold that rape can be committed recklessly and that the approach is subjective. Although it is true that Dickson J. could have explored the layers of meaning of the world "recklessness" in other branches of the law, there would be no immediate advantage in so doing. It is also true that recklessness in criminal law has sometimes been interpreted in the objective sense, usually involving a concept of gross negligence, but this notion is confined to that rogue concept in our Code — criminal negligence.[53] Because section 203 speaks of "*wanton* or reckless", arguably the objective approach is express.[54] Finally, although Dickson J. does not address the existence or wisdom of objective offences, he himself has recognized the objective standard for manslaughter[55] and for public welfare offences in *Sault Ste Marie*. It is to be hoped that the

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[52] *Culpable Mistakes and Rape: Harsh Words on Pappajohn* (forthcoming).

[53] The sorry debacle of case law is reviewed in *Annual Survey of Canadian Law: Part 3. Criminal Law and Procedure* (1977) 9 Ottawa L. Rev. 568, 576-7.

[54] Dangerous driving is defined in the *Criminal Code*, R.S.C. 1970, c. C-34, 233(4) as driving "*in a manner that is dangerous* to the public, having regard to all the circumstances including the nature, condition and use of such place and the amount of traffic that at the time is or might *reasonably* be expected" [emphasis added].

[55] *R.* v. *Smithers* [1978] 1 S.C.R. 506, 519-20.

Supreme Court will fully investigate variable and individual standards of objective negligence when the next occasion arises. In *Pappajohn*, at least, there was no context for such an investigation, since there is no authority anywhere for an objective approach to rape.

Pickard's most serious criticism refers to Dickson J.'s supposed orthodoxy. She herself has recently written an article on the law of mistake,[56] in which she criticizes the value of a "global concept of *mens rea* conceived as the agglomerate of defined mental states" as too simple, not reflecting lay concepts of blameworthiness and resulting in difficult issues like that of the relationship of factual mistakes to culpability being derivatively resolved on the narrow basis of "asserting the logical implications of initial definitions". Her preference is for a normative approach, developed offence-by-offence. She chooses to test this hypothesis on the offence of rape. In a carefully restricted argument, she proposes that in rape an unreasonable mistake as to consent is sufficiently culpable for a conviction. This view is expressly not based on policy concerns for the victim[57] but on an analysis of the nature of the conduct involved in rape. A man about to have sexual intercourse has "his mind focussed necessarily on the legally relevant transaction" which can only be determined as harmful by "reference to the world outside him";[58] he must, therefore, be required to inquire into consent. Balancing the minimal cost of taking reasonable care in this inquiry as against the major harm caused to the woman, she concludes it is sound and fair policy to require "reasonable care, given the capabilities of the actor".[59] She rejects the argument that this would be unfair and that making a mistake, even an unreasonable one, is not bad enough for criminal responsibility.

Pickard's work is a clear and impressive reminder that established principles, whatever their antiquity, must be continually tested and justified by rigorous critical analysis.

Yet we need not be "in total bondage to the subjectivist bug"[60] to disagree with Pickard's conclusions. We can favour a cautious extension to an objective approach in some cases, perhaps limited to a concept of gross objective negligence, but still believe that the general approach should be subjective and that a distinction in culpability between objective and subjective standards should be preserved. Moreover, Pickard fails to recognize that her approach,

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[56] *Supra*, note 12, with which I respectfully disagree.
[57] *Ibid.*, 90, n. 45.
[58] *Ibid.*, 75.
[59] *Ibid.*, 77.
[60] Cross, *supra*, note 2, 551.

however sensitive in allowing for individual factors, involves an objective standard.[61] We must be honest and not use double talk. She also develops a notion of culpability for the purposes of conviction without relating this to the question of penalty. Yet, we should know enough about the ineffectiveness of the criminal sanction to realize it must be used with restraint. Surely we should distinguish in advance those subjectively from those objectively at fault when convicting and sentencing. Finally, she does not adequately demonstrate that her offence-by-offence model has advantages outweighing the disavantages of departing from the search for sound principles.

Pickard's approach involves unworldly complexity as well as several conceptual weaknesses. In the course of distinguishing the offence of rape, Pickard fashions a novel and intricate analysis, in which certain propositions are at least questionable:

1. Although it does not excuse in the case of recklessness as to circumstances, simple ignorance will provide a defence in a case of knowledge as to circumstances, or intention, or recklessness as to consequences.[62]
2. The act of rape necessarily focuses the accused's mind on the relevant legal transaction, whereas acts of homicide, driving, construction, and possession[63] necessarily do not.
3. Her notion of careless advertence[64] differs from the familiar Williams double-barrelled notion of recklessness, in which there is a requirement of subjective foresight, but also one of objective disregard.[65]
4. The inquiry into consent to sexual intercourse is a "simple" one of "actual verbal inquiry".[66]
5. The choice of express *mens rea* words by Parliament is completely determinative of fundamental questions of culpability.[67]

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[61] "This individualized standard is neither 'subjective' nor 'objective'. It partakes of the subjective position because the inquiry the fact finder must conduct is about the defendant himself, not about some hypothetical ordinary person. It partakes of the objective position because the inquiry is not limited to that was, in fact, in the actor's mind, but includes an inquiry into what could have been in it, and a judgment about what ought to have been in it" (*supra*, note 12, 79).

[62] *Ibid.*, 76-7, 96-7. It is submitted that Williams's similar view (*supra*, note 2, 151-2) is wrong and astounding from one who has done more than anyone else to ensure the subjective approach is not distorted. In his *Textbook of Criminal Law* Williams retains his conclusion but expresses misgivings (p. 75).

[63] See Pickard, note 12, 76, n. 5; 81; 88.

[64] *Ibid.*, 81.

[65] Williams, *supra*, note 2, 58-64.

[66] Pickard, *supra*, note 12, 81.

[67] *Ibid.*, 85, rightly refuted by Dickson J. (*supra*, note 1, 266).

6. An unreasonable mistake will excuse in offences requiring knowledge or intention but not those requiring recklessness.[68]

Until such weaknesses in Pickard's theory are addressed, those like myself, who find good reason to believe in subjective orthodoxy, with qualifications, will continue to support decisions such as *Pappajohn.*

Don Stuart*

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[68] *Ibid.*, 85, n. 34.

* Professor of Law, Queen's University.