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COMMENT

TWENTY YEARS OF *MORGAN*: A CRITICISM OF THE SUBJECTIVIST VIEW OF *MENS REA* AND RAPE IN GREAT BRITAIN†

I. INTRODUCTION

Throughout the twentieth century, modern societies have attempted to embrace the concept of gender equality. More specifically, a rapid transformation of the perception of women in society has occurred during the last two decades. This change in perception has served to balance the social, economic, and educational inequalities existing between the sexes.

The law has also attempted to embrace this concept. In its current state, the democratic legal system is said to have reached a point where it is gender neutral. However, there are still areas under the law where fundamental differences in the roles and perceptions of men and women clash and meet with disaster. For example, the crime of rape represents an archaic perception of the male as an aggressor and the female as a victim. However, the law regarding rape in many modern societies is equally archaic, with the woman remaining a victim within the criminal legal system.

Great Britain provides an illustration of this type of inequity within the law. In *Director of Public Prosecutions v. Morgan*,¹ a 1975 rape case, the House of Lords confronted the issue of what standard of *mens rea* applies to the crime of rape. Three of the defendants in *Morgan* were accused of raping the es-

† The author would like to dedicate this article to Carol and Kenneth Alexander.

¹ 2 All E.R. 347 (1975).

tranged wife of an RAF officer.² They claimed to have an honest belief in her consent and asserted that the trial court had erred in charging the jury that their belief in consent had to be reasonable in order to constitute a valid defense. The House of Lords ruled that a defendant accused of rape may be acquitted even if he had an unreasonable belief in the victim's consent, thereby discarding the reasonableness component for the *mens rea* element of rape.³ This was done in clear contradiction with most other criminal offenses which require a defense of mistaken belief to be reasonable. This decision, still followed today, fails to consider that the laws need to be designed in a manner that provides equal protection for both sexes.⁴

This commentary will focus on the issues discussed in *Director of Public Prosecutions v. Morgan*,⁵ the landmark rape case which set the precedent for the standard of *mens rea*⁶ in Great Britain. Many legal scholars considered the decision to be a serious digression from the previously established rights of women as victims of sex crimes.⁷ This analysis of *Morgan* will

² *Id.* at 353. The fourth defendant, the victim's estranged husband, was not charged with rape because of the marital rape exemption in Great Britain. *Id.*

³ *Id.* at 347. The concise holding of *Morgan* is as follows:

The crime of rape consisted in having sexual intercourse with a woman with intent to do so without her consent or with indifference as to whether or not she consented. It could not be committed if that essential *mens rea* were absent. Accordingly, if an accused in fact believed that the woman consented, whether or not that belief was based on reasonable grounds, he could not be found guilty of rape.

Id.

⁴ For further discussion of varying perceptions of rape, consult the following: Kristin Bumiller, *Fallen Angels: The Representation of Violence Against Women in Legal Culture*, 18 INT'L. J. SOC. L. 125 (1990); Lynne Henderson, *Getting to Know: Honoring Women in Law and Fact*, 2 TEX. J. WOMEN & L. 41 (1993); W.L. Marshall & H.E. Barbaree, *A Behavioral View of Rape*, 7 INT'L J.L. & PSYCHIATRY 51 (1984).

⁵ The crime of rape is steadily growing in modern societies. A 1991 report shows a 17% increase in rapes reported in Great Britain since 1990. *Rape: the Global Epidemic*, EVENING STANDARD, February 13, 1992, at 18. In the United States, rape has increased by 25% in the last ten years. *Id.* However, surveys done by the U.S. Census Bureau, the FBI and the National Research Center estimate that only 3.5% to 10% of all rapes are reported. Maureen Dowd, *Rape: The Sexual Weapon*, TIME, September 5, 1993, at 27.

⁶ *Mens rea* is the mental element or state of mind that is necessary to commit a crime. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.4 (2d ed. 1986).

⁷ See generally Zsuzanna Adler, *Rape Law - the Latest Ruling*, 132 NEW L. J. 746 (1982). Adler's article focuses on a related controversy occurring after *Morgan* - the admissibility and relevance of the victim's past sexual experiences.

propose that the standard for the determination of intent in rape should center on the perceptions of both the accused and the victim, as well as the objective evidence presented.⁸

II. DEVELOPMENT OF *MENS REA* IN THE COMMON LAW - THE *MORGAN* CASE

Morgan is noteworthy after twenty years because it still reflects the law in Great Britain.⁹ The attempts to remove the cloud over *mens rea* in rape by establishing a more definitive standard have been largely unsuccessful. The use of the subjective standard of proof has garnered much criticism, and the courts have encountered much confusion in applying the *Morgan* holding to subsequent cases.¹⁰

A. *Facts*

Morgan, a Royal Air Force lieutenant, met three enlisted men at a bar.¹¹ After spending the evening with them, Morgan suggested that the three men come back to his house to have intercourse with his wife.¹² According to the men, Morgan told them that his wife had "kinky" sexual habits and would welcome their advances.¹³ Morgan further explained to them that

⁸ This standard does not appear to be necessary in cases of rape where the attacker was a stranger to the victim. However, in situations of acquaintance rape, date rape, family rape, and marital rape, the victim and the attacker share a relationship with one another on some level. The author will argue that in these situations, the perceptions of both parties as to the parameters of those relationships, as well as the perceptions of the particular circumstances are crucial in developing a fair standard of *mens rea* in rape.

⁹ This decision has never been expressly overruled. However, as a result of the controversy created by the *Morgan* decision, Parliament commissioned a study to investigate the effects of the decision. See *infra* notes 163-87 and accompanying text. The results of this study were later codified by Parliament in the Sexual Offences Act of 1976. Sexual Offences Act, 1976, ch. 82, § 1 (Eng.). Although this statute can technically be said to supercede the case law, *Morgan* continues to be cited as an authority in rape law. See *infra* notes 231-85 and accompanying text.

¹⁰ *Id.*

¹¹ *Morgan*, 2 All E.R. at 354. According to the facts, defendants McDonald, McLarty, and Parker did not know Morgan prior to that night. *Id.* at 369. Morgan was, however, a superior R.A.F. officer. *Id.* at 354.

¹² *Id.* At the time of the incident, Morgan was estranged from his wife and not sharing the same bed. *Id.*

¹³ *Id.* at 355. This was testified to by the enlisted men at trial. However, Morgan denied the allegations. *Id.*

his wife may appear to resist and struggle, but in reality she was enjoying the sex act.¹⁴

The men accompanied Morgan to his house, where his wife was asleep.¹⁵ In the presence of their young children, Morgan and the three men dragged Mrs. Morgan out of her bedroom by her arms and legs.¹⁶ They proceeded to drag her into another room with a double bed.¹⁷ Each man raped Mrs. Morgan while the others held her down.¹⁸ Following the attack, Mrs. Morgan went to a nearby hospital and reported that she had been raped.¹⁹ Mrs. Morgan testified that she had fought off the attack as best she could, but was unable to escape from the four men.²⁰

The defense's case was based on the claim that Mrs. Morgan had consented to the sexual activity.²¹ They claimed that if Mrs. Morgan had not, in fact, consented to intercourse, they each had a mistaken belief that she did consent.²² The trial court instructed the jury that if Mrs. Morgan did not consent, the defendants' beliefs that she did consent were only a defense to the crime of rape if those beliefs were based on reasonable grounds.²³

¹⁴ *Id.* For a discussion of male perceptions of women within the sex act, see Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and Absence of Consent*, 92 COLUM. L. REV. 1780 (1992); P.M. Mazelan, *Stereotypes and Perceptions of the Victims of Rape*, 5 VICTIMOLOGY 121 (1980); Zindel V. Segal and Lana Stermac, *A Measure of Rapists' Attitudes Towards Women*, 7 J.L. & PSYCH. 437 (1984); Bumiller, *supra* note 4; Henderson, *supra* note 4; Marshall & Barbaree, *supra* note 4.

¹⁵ *Morgan*, 2 All E.R. at 354. Mrs. Morgan was sleeping on a cot in one of the children's bedrooms at the time of the attack. *Id.*

¹⁶ *Id.* The facts of this case demonstrate a force element commonly associated with rape. However, the issues addressed here also relate to cases of rape brought on by circumstances of fear, fraud, and duress.

¹⁷ *Id.*

¹⁸ *Id.* Mrs. Morgan testified that the defendants held her down the entire time. At one point when she yelled to her children to call the police, the defendants held her nose and mouth shut until she couldn't breathe. *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 354-55. After their initial arrests, each defendant gave a statement to the police, corroborating Mrs. Morgan's account of the events. However, the defendants testified at trial that Mrs. Morgan was a willing participant, contrary to their original statements. *Id.* at 369.

²² *Id.* at 349. For a summary by Lord Cross of Chelsea of the points of law argued by the appellant and respondent, see *id.* at 349-52.

²³ *Id.* at 356. The judge instructed the jury as follows:

B. *Treatment of Rape Before Morgan*

Before the court's decision in *Morgan*, there was no established case law regarding the issue of *mens rea* in rape.²⁴ However, the courts in Great Britain had discussed the issue of *mens rea* in other types of criminal offenses. The court had previously interpreted criminal statutes and defined standards of *mens rea* for different offenses.²⁵ In addition, the court often debated whether a reasonably held belief could act as a defense to a crime.²⁶ For most offenses, it was thought that a defendant's mistaken belief could only negate the intent of his crime if the mistake was a reasonable one.²⁷ These issues closely parallel those which were later faced by the *Morgan* court.

In examining the development of the law of rape, it is necessary to understand the societal development of women in a historical context. Many ancient societies viewed women as a type of mother-goddess symbol.²⁸ Women engaged in a high level of physical autonomy during this time, as society placed a high

[T]he prosecution have to prove that each defendant intended to have sexual intercourse with this woman without her consent. . . . [T]herefore if the defendant believed or may have believed that Mrs. Morgan consented to him having sexual intercourse with her, then there would be no such intent in his mind and he would not be guilty of the offence of rape, but such a belief must be honestly held by the defendant in the first place. . . . And, secondly, his belief must be a reasonable belief.

Id.

²⁴ There were several rape cases reported in the appellate courts, but none that dealt with the issue of requisite intent. For information on selected rape cases preceding *Morgan*, see *James v. Regina*, 55 Cr. App. 299 (P.C. 1970) (requiring corroborative evidence in proving absence of consent); *Chiu Nang Hong v. Public Prosecutor*, 1 W.L.R. 1279 (P.C. 1964) (deciding whether miscarriage of justice occurred when judge ordered conviction without corroborative evidence in rape case); *Regina v. Lang*, 62 Cr. App. 50 (1975) (deciding on whether drunkenness can affect a victim's capacity to consent); *Regina v. Krausz*, 57 Cr. App. 466 (1973) (relevance of complainant's feelings about sentence on appeal); *Regina v. Gunnell*, 50 Cr. App. 242 (1966) (sentencing for a series of rapes and attempted rapes); *Regina v. Touhey*, 45 Cr. App. 23 (1960) (discussing the alternative verdict of indecent assault on a rape charge); *Regina v. Cummings*, 1 All E.R. 551 (C.A. 1948) (addressing whether or not a complaint of rape was made in a timely manner); *Regina v. O'Brien*, 3 All E.R. 663 (Bristol 1974) (discussing the effect of the marital rape exemption where alleged rape occurred after decree nisi was granted but before the divorce decree absolute).

²⁵ See *infra* notes 48-99 and accompanying text.

²⁶ See *infra* notes 48-99 and accompanying text.

²⁷ See *infra* notes 48-99 and accompanying text.

²⁸ See NANCY C. GAMBLE & LEE MADIGAN, *THE SECOND RAPE* 11-13 (1989).

value on traditional passages of womanhood - menstruation, pregnancy, and childbirth.²⁹ However, as the world began to evolve toward a patriarchal structure, women began to lose this status.³⁰

The crime of rape evolved from the early Roman law of *raptus*, "a form of violent theft that could apply to both property and persons."³¹ By the twelfth century, Roman law separated crimes against persons from property crimes, defining rape as an assault that involved "abduction, coitus, violence, and lack of *free consent* on the part of the woman."³² Under Roman law, injury was based on damages to a father, husband, or brother because the rapist's act was said to imply that the male caretaker was too weak or timid to protect the victim.³³ However, treatment of rape was based on the effect it had on men related to the victim. Biblical references to the rape of virgins portray it as an economic crime against property.³⁴ Christian, Judeo, and Islamic teachings each developed concepts of "female guilt," providing images of women as sources of sexual temptation and distraction.³⁵ Anglo-Saxon law had a similar abduction crime not focused exclusively on rape.³⁶

²⁹ *Id.* Gamble and Madigan note that the time period referred to dates back to the first thirty thousand years of human culture. *Id.* at 11.

³⁰ *Id.* at 13. This transformation began approximately 3000 B.C. *Id.* "The mother goddess, once a symbol of unity, was dichotomized into extremes. Women were either idealized as the good, passive ovulating wife, rather asexual except to bear her husband's children, or the wanton sex fiend." *Id.*

³¹ JULIA R. & HERMAN SCHWENDINGER, *RAPE AND INEQUALITY* 95 (1983). *Raptus* was not considered to be a sex crime; rather, sex crimes were encompassed under this assault law. *Id.*

³² *Id.* at 102.

³³ See Dripps, *supra* note 14, at 1782 n.8. This exemplifies the traditional framework of rape law. From its inception, the law sought to protect the indignities suffered by males in the situation. See Dripps, *supra* note 14, at 1782-83. For further discussion of the Roman law of rape, see JANE F. GARDNER, *WOMEN IN ROMAN LAW AND SOCIETY* 118-21 (1986). Dripps, *supra* note 14, at 1782 n.8.

³⁴ Dripps, *supra* note 14, at 1781. Dripps cites Deuteronomy 22:22-29 as categorizing rape victims as "betrothed or unbetrothed virgins." Dripps, *supra* note 14, at 1781 n.5 & 6. For specific references to rape as an economic crime, see comments which include actual citations. Dripps, *supra* note 14, at n.6.

³⁵ See Henderson, *supra* note 4, at 43-45.

³⁶ JULIA R. & HERMAN SCHWENDINGER, *supra* note 31, at 96-97. The law stated that the aggressor would have to pay 50 shillings "to her owner" if a man "carrie[sic] off a maiden." JULIA R. & HERMAN SCHWENDINGER, *supra* note 31, at 97 (citing *THE LAWS OF THE EARLIEST ENGLISH KINGS* 63 (F.L. Attenborough ed. & trans. 1963)).

Under early English common law, the high courts did not prosecute the rape of women other than virgins because it did not implicate the King's Peace.³⁷ Rather, rape cases were handled by local feudal courts or avenged privately.³⁸ English common law also allowed for a rape conviction to be nullified if the victim agreed to wed the rapist.³⁹

By the eighteenth and nineteenth centuries, most English women accepted rape as one of many indignities they endured, like domestic violence.⁴⁰ Feminist scholars maintain that the definition of rape was constructed "by men and for men."⁴¹ While women viewed rape in terms of lack of consent and physical pain, men viewed rape as a crime only if the victim was considered to be chaste.⁴² Sir Matthew Hale, in speaking about rape, once stated that "it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho[sic] never so innocent."⁴³ In addition to perceptions of this nature, rape complainants had to contend with a corroboration requirement and public scru-

³⁷ Dripps, *supra* note 14, at 1782. The failure to consider rape as a crime against society reflects the position of women as second class citizens both in society and under the law.

³⁸ Dripps, *supra* note 14, at 1782.

³⁹ Dripps, *supra* note 14, at 1782. The author asserts that marrying the rapist would relieve the victim's family of "damaged goods." Dripps, *supra* note 14, at 1782 (citing 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 417-18 (George E. Woodbine ed. & Samuel E. Thorne trans., 1968)).

⁴⁰ See ANNA CLARK, *WOMEN'S SILENCE AND MEN'S VIOLENCE: SEXUAL ASSAULT IN ENGLAND 1770-1845*, at 28 (1987). But Clark comments:

[N]o matter how a woman regarded her sexuality, rape was a traumatic experience. If a woman prized her chastity as essential for marriage, a rapist ruined her. If she regarded her sexuality as a source of her own pleasure, the rapist violated her right to desire or refuse. If she sold her sexuality for subsistence, rape was still an unexpected, violent assault.

Id.

⁴¹ *Id.* at 24.

⁴² *Id.* at 23. Once a woman was violated, society would regard her as damaged property. *Id.* at 21. In addition, husbands of rape victims sometimes used the attack as a justification for divorce. *Id.* at 29. Rape attacks were discounted to the point that reported rape cases were often republished as fantasy stories for men in the upper echelons of English society. *Id.* at 35.

⁴³ Susan Edwards, *Sexuality, Sexual Offenses and Conceptions of Victims in the Criminal Justice Process*, 8 VICTIMOLOGY 113, 118 (1983) (citing M. HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 636 (1971)).

tiny when attempting to prosecute.⁴⁴ Further, the victim had to fight a constant battle of credibility.⁴⁵

The evolution of English common law slowly began to recognize a different perception of rape. While the focus of the injury began to center on a woman's physical autonomy,⁴⁶ there was little treatment of the state of mind needed to commit rape. Rape cases dating back before *Morgan* fail to address this issue. However, in order to evaluate the decision in *Morgan*, it is necessary to see how the issue of determining *mens rea* was treated with respect to other criminal offenses. The following section provides an overview of cases predating *Morgan* which address *mens rea* as it relates to various criminal offenses.⁴⁷ This standard is later rejected by the House of Lords in *Morgan*.

1. *Regina v. Tolson*⁴⁸

This case was instrumental in establishing the principle of allowing a reasonably held mistaken belief as a defense to certain crimes. In *Tolson*, the defendant had remarried while still legally married to her first husband, and was convicted of bigamy.⁴⁹ The statute read that "whoever being married shall marry any other person during the life of the former wife or husband shall be guilty of a felony. . . ."⁵⁰ While the defendant's actions clearly came within the words of the statute, she claimed that she was not guilty because she believed that her first husband was dead.⁵¹

On appeal, the House of Lords overturned the conviction. Based on the evidence presented, the court found that the de-

⁴⁴ See *id.* at 118-19.

⁴⁵ See *id.* at 118-20. Edwards maintains that from 1817 to 1976, criminal procedure laws allowed a victim's sexual activities with other men as evidence of credibility. *Id.*

⁴⁶ This is shown in recent trends in rape law reform. In the United States, some state legislatures have revised the rules of evidence and criminal procedure, seeking to exclude evidence of past sexual history and the "abolition of the corroboration and resistance requirements." See Dripps *supra* note 14, at 1783 (citing Leigh Bienen, *Rape III - National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170, 181-82, 197-200 (1980)).

⁴⁷ It is important to consider the following cases in light of the fact that no English case defining the standard of *mens rea* in rape existed before *Morgan*.

⁴⁸ 58 L.J.R. 97 (Cr. Cas. Res. 1889).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

fendant did, in fact, manifest a belief in the death of her first husband.⁵² Further, the objective evidence showed that this belief was based on reasonable grounds.⁵³ Since the defendant's actions would have been innocent if the circumstances were as she believed them to be, the court held that the defendant did not have the requisite intent to commit the offense.⁵⁴

2. *Regina v. Chisam*⁵⁵

The defendant in this case awoke after he heard a group of people making loud noises outside his house.⁵⁶ Following a verbal altercation, the defendant fired two shots outside.⁵⁷ The angry mob retaliated by breaking into the defendant's home.⁵⁸ The defendant armed himself with a stick and approached the group.⁵⁹ He had wounded one of the men with the gunshots, and later killed him in a struggle inside the house.⁶⁰ Chisam was convicted of manslaughter and sentenced to life imprisonment.⁶¹

In appealing the conviction, the defendant claimed that the shots were random and his actions were in self-defense.⁶² Chisam's defense raised two questions: First, did the defendant have an honest belief that he and his family were in danger? Second, if so, was this belief based on reasonable grounds?⁶³ The defense claimed Chisam's conviction should be overturned on the ground that the jury was not instructed by the trial court judge to determine whether his belief was reasonable.⁶⁴

The Court of Criminal Appeals agreed with the defendant's argument that an honest belief based on reasonable grounds

⁵² See *id.* at 99.

⁵³ See *id.*

⁵⁴ *Id.*

⁵⁵ 47 Crim. App. 130 (1963).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 131.

⁶⁰ *Id.* at 130-31.

⁶¹ *Id.* at 130.

⁶² *Id.* at 132. Chisam maintained that he was in fear that his safety and the safety of his family were in jeopardy. *Id.* at 134.

⁶³ *Id.* at 133.

⁶⁴ *Id.*

can constitute a defense to murder.⁶⁵ In the development of British criminal law, it was well recognized that to plead self-defense, "[t]here must be a reasonable necessity for the killing, or at least an honest belief based upon reasonable grounds that there is such a necessity."⁶⁶ It was not necessary for the jury to believe that the defendant's life was in danger. Rather, the jury must find the defendant had a reasonable belief that, under the circumstances, his life was in danger.⁶⁷ The court reaffirmed the principle outlined in *Tolson* that this belief must be based on reasonable grounds in order to act as a defense.⁶⁸

3. *Regina v. Gould*⁶⁹

In *Gould*, the court decided the possible negation of *mens rea* in a bigamy case.⁷⁰ Defendant was married in 1959, and began divorce proceedings a few years later.⁷¹ During the divorce process, the defendant spent one year in jail.⁷² When he was released, the couple had a brief period of reconciliation which ended within a few weeks.⁷³ The defendant remarried later that year, and was subsequently charged with bigamy.⁷⁴ Without the advice of counsel, he plead guilty to the charge.⁷⁵

Later, he petitioned the court to retract his guilty plea and quash his conviction on the ground that he had a valid defense.⁷⁶ The defendant testified that when he was released from prison, his wife told him their divorce proceedings were completed.⁷⁷ He claimed he was not guilty of bigamy because

⁶⁵ *Id.* Although the court agreed that the trial court judge failed to instruct the jury as to reasonableness, it upheld the conviction. Because the trial jury found that the defendant was not acting on an honest belief, the court held that the question of reasonableness was moot. Therefore, the trial court judge's mistake was harmless error. *See generally id.* at 134.

⁶⁶ *Id.* at 133 (quoting 10 HALSBURY'S LAWS OF ENGLAND 721 (3d ed.)).

⁶⁷ *Id.* at 134.

⁶⁸ *See id.* at 133-34.

⁶⁹ 1 All E.R. 849 (C.A. 1968).

⁷⁰ *Id.* at 850.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

he honestly and reasonably believed that he was divorced from his first wife at the time of his second marriage.⁷⁸

In their decision, the court supported the defendant's contention by holding the defense to be valid and quashing the conviction.⁷⁹ The statute was silent as to the degree of intent necessary to be found guilty of bigamy.⁸⁰ The court had to interpret the existing bigamy statute and decide whether to read in some degree of *mens rea*. Their decision answered the question of whether or not bigamy was an absolute offense.⁸¹ They held that the statute should be interpreted loosely to include some degree of *mens rea*.⁸² Further, the court extended the principle that an honest and reasonably held belief could act to negate the *mens rea* necessary to be convicted of bigamy.⁸³

4. *Sweet v. Parsley*⁸⁴

In this case, the defendant appealed a drug conviction stemming from the discovery of marijuana in a house which she rented to others.⁸⁵ She claimed that she had no knowledge of the tenant's drug use and should not be convicted under the statute.⁸⁶

The House of Lords reversed the conviction because, like in *Gould*, the statute did not specifically delineate a standard of *mens rea*. In this situation, the court determined it was their province to read a standard of *mens rea* into the statute.⁸⁷

⁷⁸ *Id.*

⁷⁹ *Id.* at 849.

⁸⁰ *Id.* at 851. The relevant portion of Section 57 of the 1861 Offences Against the Person Act is discussed in Lord Diplock's opinion. *Id.* at 851-52.

⁸¹ *Id.* at 851-53. This case parallels *Morgan* in many respects. Here, the court was forced to construe the meaning of the bigamy statute and determine a standard of *mens rea*. The court would later be called on to do the same with the rape statute in *Morgan*. Once again, this is different from strict liability, where there is no *mens rea* element at all. Here, the prosecution is asserting that the only *mens rea* needed to be proven is that the act was intentional.

⁸² *Id.* at 852. In situations where there was no clear legislative desire to declare a requisite degree of intent for a particular offense, courts were generally inclined to put one in where it did not exist. Their decisions appeared to be guided by their determinations of general principles of equity.

⁸³ *Id.* at 853.

⁸⁴ 1 All E.R. 347 (1969).

⁸⁵ *Id.* at 349.

⁸⁶ *Id.*

⁸⁷ *Id.* at 352. The statute at issue here was Section 5 of the Dangerous Drugs Act of 1965. The House of Lords had to interpret the act because there was no

Here, the court found that under the statute, a landlord had to know of the drug use in order to be convicted.⁸⁸ The defendant claimed she did not know about the activities that went on in the house.⁸⁹ Based on the evidence, the court found her belief to be honest and reasonable. The court found it to be valid defense to the charges of drug use and possession.⁹⁰

Existing rape law was similar because there was no specific standard of *mens rea*.⁹¹ It is unclear as to what standard of *mens rea* existed because it had previously been left to the court's discretion. Prior to *Morgan*, however, the requirement of reasonableness in asserting a mistaken belief as a defense to a crime was never in question. For this defense to be valid, the jury had to find that the defendant's belief was an honest one. Once this was ascertained, the jury had to find the defendant's belief to be reasonable.

5. *Director of Public Prosecutions v. Smith*⁹²

Defendant Smith was stopped at a traffic checkpoint when police saw stolen goods in the back of his car. When police asked the defendant to get out of the car, he sped off. The officer chased the car, hanging on as it accelerated. As the car was swerving, the police officer fell off and received fatal injuries. As a result, Smith was charged and subsequently convicted of capital murder.⁹³

apparent standard of *mens rea*. *Id.* at 35. Again, this provides a parallel for what the court would do in *Morgan*.

⁸⁸ *Id.* at 351-52.

⁸⁹ *Id.* at 349.

⁹⁰ *Id.* at 354.

⁹¹ The Sexual Offences Act of 1956 stated that "it is a felony for a man to rape a woman." Sexual Offences Act, 1956, 4 Eliz. 2, ch. 69, § 1 (Eng.). It gave no further instruction as to requisite intent.

⁹² 3 All E.R. 161 (1960).

⁹³ At trial, the defendant made the following contentions:

(i) That he did not realise the officer was hanging on to the car until the officer fell off and that he could not keep a straight course having regard to the weight of the metal in the back. In other words, he raised the defense of accident.

(ii) Alternatively, that it was a case of manslaughter and not murder in that he had no intent to kill or do grievous bodily harm.

Id. at 165.

The trial judge instructed the jury to compare the actions of the defendant against those of a reasonable man.⁹⁴ If they were satisfied the defendant, as a reasonable man, must have contemplated the harm that would come to the police officer, then they should find him guilty of capital murder.⁹⁵ The defendant appealed on this basis, claiming the judge's directions should have focused on what he himself intended.⁹⁶

The Court of Criminal Appeals reversed, holding the trial judge misdirected the jury on the issue of intent.⁹⁷ The question was certified to the House of Lords, who declared that the objective method of determining *mens rea* was correctly used by the trial court.⁹⁸ The court reasoned that "the danger which in that fact exists under the known circumstances ought to be of a class which a man of reasonable prudence could foresee. Ignorance of a fact and inability to foresee a consequence have the same effect on blameworthiness."⁹⁹

C. *Background of Mens Rea*

The term *mens rea* is a Latin phrase meaning "guilty mind."¹⁰⁰ To understand why *mens rea* is important in determining criminal liability, it is necessary to discuss a larger

⁹⁴ *Id.* at 166.

⁹⁵ *Id.*

⁹⁶ *Id.*

The main complaint is that the learned judge was there applying what is referred to as an objective test, namely, the test of what a reasonable man would contemplate as the probable result of his acts, and, therefore, would intend, whereas the question for the jury, it is said, was what the respondent himself intended.

Id.

⁹⁷ *Id.* The first issue raised by the defendant, that it was an accident, was not raised on appeal. *Id.* However, the Court of Appeal did agree with the defendant that a purely subjective standard should be used to evaluate *mens rea*. *Id.* at 166-67.

⁹⁸ *Id.* at 167. The court explained that the objective test was well settled in general principles of criminal law. *See id.*

⁹⁹ *Id.* (quoting OLIVER W. HOLMES, JR., *THE COMMON LAW* 53 (1945)). Viscount Kilmuir also explained that use of the term "reasonable man" here should not be confused with its use as the standard of care in civil cases. Rather, he stated that "it really denotes an ordinary man capable of reasoning who is responsible and accountable for his actions, and this is the sense in which it would be understood by a jury." *Id.*

¹⁰⁰ BLACK'S LAW DICTIONARY 985 (6th ed. 1990).

question. Why does society punish?¹⁰¹ There are several plausible reasons. Punishment can serve to deter further crime, to rehabilitate the offender, to act as retribution, or to give the victim justice and peace of mind. The significance of a guilty mind in the commission of a crime depends on what society's goals are in punishing the offender.¹⁰²

Generally, the commission of a crime requires two distinct elements: a physical act and a mental act.¹⁰³ *Mens rea* refers to the mental act or state of mind that is required.¹⁰⁴ Most offenses are codified by statutes. Within the statute there is usually some explanation of the type of intent that a person must have in order to commit that offense.¹⁰⁵

There are four basic types of crimes which are delineated by the requisite mental state:¹⁰⁶ (1) crimes that require intention or purpose to do an act or cause a result;¹⁰⁷ (2) crimes that require knowledge of the nature of the act, knowledge of the result, or knowledge of the attendant circumstances;¹⁰⁸ (3) crimes that require recklessness in doing the act or causing the

¹⁰¹ See generally WAYNE R. LAFAVE & AUSTIN W. SCOTT, *supra* note 6.

¹⁰² CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW (14th ed. 1978). Wharton cites retribution, deterrence and reformation as purposes of the criminal law. In explaining the functions of the criminal law, Wharton says the following:

(1) It defines conduct which is deemed sufficiently injurious to the interests of the individual or community to warrant the protection of a criminal law. The anti-social conduct which is punishable as a crime may, but need not, be immoral. But not all immoral conduct is punishable as a crime. (2) It provides a punishment for the criminal conduct, geared primarily to the gravity of the offense, yet broad enough in latitude to accommodate the characteristics of individual offenders.

Id. at § 1.

¹⁰³ See generally LAFAVE & SCOTT, *supra* note 6. The requirements under the mental component vary, depending upon the criminal act.

¹⁰⁴ LAFAVE & SCOTT, *supra* note 6.

¹⁰⁵ LAFAVE & SCOTT, *supra* note 6.

¹⁰⁶ There are the four general categories of *mens rea* as outlined by the Model Penal Code, § 2.02(2), reviewed by LAFAVE & SCOTT, *supra* note 6. The Model Penal Code also addresses strict liability crimes. A discussion of strict liability crimes is not necessary for the scope of this argument.

¹⁰⁷ LAFAVE & SCOTT, *supra* note 6. For crimes that require purpose or intent, the actor must set out to complete the required act to produce the resulting consequences.

¹⁰⁸ LAFAVE & SCOTT, *supra* note 6. Under this standard, an actor must understand the act he is committing and be aware of the potential consequences.

result;¹⁰⁹ and (4) crimes that require only negligence in doing an act or causing a result.¹¹⁰

However, difficulties arise in trying to determine the requisite *mens rea* for an offense. Even though most statutes offer a standard such as "negligently," "recklessly," or "knowingly," these words are ambiguous and subject to interpretation.¹¹¹ It becomes even more difficult if the statute does not provide a standard, or if there is no statute to codify an offense. More importantly, once a standard for *mens rea* is established, it becomes necessary to delineate whether to enforce that standard on objective or subjective grounds.

Webster's Third New International Dictionary¹¹² explains that "subjective" is characteristic of a reality perceived in the mind, as opposed to an actual independent reality.¹¹³ A subjective standard of reviewing a person's intent focuses on what the perceptions are in that person's mind and how that person views the circumstances of a particular situation. Using a subjective standard, fault may only be assigned when it can be shown that the actor, in his own mind, realized the risk that his conduct involved.¹¹⁴

In contrast, an objective standard focuses on evidence independent of the actor's thought.¹¹⁵ It views the facts for what they are, rather than what the actor perceived them to be. Moreover, the objective approach evaluates those facts based on what is considered reasonable by current societal standards.

¹⁰⁹ LAFAYE & SCOTT, *supra* note 6. When an actor is reckless, he either disregards the hazards of the act itself and the consequences in committing a particular act or does not realize or care what they may be.

¹¹⁰ LAFAYE & SCOTT, *supra* note 6. For crimes that have a negligence standard, the actor must fail to conduct himself in the manner of a reasonably prudent person.

¹¹¹ LAFAYE & SCOTT, *supra* note 6.

¹¹² WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1976).

¹¹³ *Id.* at 2275.

¹¹⁴ LAFAYE & SCOTT, *supra* note 6. This is contrasted with an objective standard which focuses on evidence independent of the actor's thought.

¹¹⁵ See M.R. Goode, *Mens Rea in Corpore Reo: An Exploration of the Rapist's Charter*, 7 DALHOUSIE L.J. 447 (1983); Richard Townshend-Smith, *Objective Liability Reasserted*, 126 SOLICITOR'S J. 738 (1982).

III. AN EXPLANATION OF *MENS REA* IN RAPE: *MORGAN*A. *Holding of Morgan*

The trial court instructed the jury as to the general principle of mistaken belief as a defense.¹¹⁶ The judge stated that for the defendants' belief to constitute a valid defense, it must satisfy two considerations. First, the belief must be found to be honest; second, the belief must be found to be based on reasonable grounds.¹¹⁷

The defendants were subsequently convicted and appealed to the House of Lords.¹¹⁸ The issue on appeal centered around the "reasonableness" prong of the defense outlined by the trial court.¹¹⁹ The Court of Appeals certified the issue to the House of Lords as follows: "[w]hether, in rape, the defendant can properly be convicted, notwithstanding that he in fact believed that the woman consented if such belief was not based on reasonable grounds."¹²⁰

The focus was whether a defendant's unreasonable belief in consent to sexual intercourse could act to acquit him.¹²¹ The defendants and the state argued differing definitions of rape and mental culpability. The defense claimed that in order to satisfy the mental element in rape, the accused must be "either aware that she was not consenting or did not care whether or not she consented."¹²² Since the state could not bring forth positive evidence of the defendant's state of mind, the defense asserted the state should present evidence to show the victim did

¹¹⁶ *Morgan*, 2 All E.R. at 356.

¹¹⁷ *Id.* In explaining the concept of reasonable belief, the trial judge stated that it is "such a belief as a reasonable man would entertain if he applied his mind and thought about the matter. It is not enough for a defendant to rely upon a belief, even though he honestly held it, if it was completely fanciful. . . ." *Id.*

¹¹⁸ *Id.* at 349. The Court of Appeals, Criminal Division, dismissed the initial appeals. *Id.* However, the case was successfully appealed to the House of Lords because "the decision involved a point of law of general public importance." *Id.*

¹¹⁹ *Id.* at 354.

¹²⁰ *Id.* A second issue that the Lords had to consider was conditioned on the outcome of this. If they found that the trial judge had misdirected the jury on reasonableness, they had to decide whether to uphold the conviction on the grounds that no miscarriage of justice resulted. *Id.* at 349.

¹²¹ *Id.* at 349-53. A related issue disputed by both sides was the evidentiary burden of proving intent. *See id.* at 350-53.

¹²² *Id.* at 349.

not consent.¹²³ The defendant then has the option to offer evidence that he believed that the victim was consenting and evidence of his reasons for that belief.¹²⁴ The defense further stated the evidentiary burden of the accused's belief in consent should be on the state at all times.¹²⁵

Conversely, the state maintained the only standard required to satisfy the *mens rea* element in rape is that the intercourse be intentional.¹²⁶ Once the state satisfied its burden of establishing "evidence of intercourse and lack of consent, . . . it is open to the defendant on general principles of criminal liability . . . to raise the defense that he had reasonable grounds for believing that the woman was consenting. . . ."¹²⁷ If this defense is raised, the judge must then decide whether evidence of the defendant's belief is sufficient to be put in front of the jury.¹²⁸ If the evidence of belief is put to the jury, the burden should then shift back to the state to show the jury that the defendant either had no such belief, or that he had no reasonable grounds for it.¹²⁹

By a three to two majority,¹³⁰ the House of Lords reversed in part the decision of the trial court.¹³¹ While the convictions

¹²³ *Id.* at 349-50. The defense asserted that evidence of the victim's lack of consent would cause the jury to draw an inference that the defendant was aware that she was not consenting. *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 350. The defense claimed that the issue of a defendant's belief in consent was one that should be in front of the jury at all times. While they maintained that the prosecution did not have to "adduce positive evidence of the defendant's state of mind," they claimed that the burden of proving this issue should be on the prosecution at all times. *Id.* at 349-50.

¹²⁶ *Id.* The prosecution never asserted that rape should be a strict liability type of crime. Their contention was that they did not need to prove any specific *mens rea*; rather, the proof of the commission of the act was sufficient to make a primary showing of intent. *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* In contrast to the defense, the prosecution contended that the defendant's belief was not an issue to be in front of the jury at all times. Instead, it should only be considered by the jury if the judge determines that the defense is sufficient. *Id.*

¹²⁹ *Id.* The prosecution viewed the issue of reasonable belief strictly as a defense to the commission of an intentional act.

¹³⁰ Lords Cross, Hailsham, and Fraser composed the majority.

¹³¹ The exact holding of *Morgan* is as follows:

(i) (Lord Simon of Glaisdale and Lord Edmund-Davies dissenting) The crime of rape consisted in having sexual intercourse with a woman with intent to do so without her consent or with indifference as to whether or not

remained intact, the court found an honest belief in consent could act to negate the *mens rea* element in rape, regardless of whether that belief was reasonable or unreasonable.¹³² The court rejected the mistaken belief defense that had been employed in numerous other cases for several reasons.¹³³

First, the court examined the existing rape statute. The Sexual Offences Act of 1956 was the first codification of the crime of rape.¹³⁴ It stated, "it is a felony for a man to rape a woman."¹³⁵ Without any further discussion of *mens rea*, the court had to decide what degree of intent to read into the statute.¹³⁶

Second, the court had to formulate a definition of rape. The state contended that rape occurs when the victim does not, in fact, consent to intercourse.¹³⁷ This definition characterizes rape as an absolute offense,¹³⁸ similar to the bigamy offense discussed in *Tolson* and *Gould*.¹³⁹ Under this definition, the only intent necessary to be proven is that the intercourse is intentional.¹⁴⁰ When an offense is determined to be absolute, the courts have generally applied the principle that an honestly held belief based on reasonable grounds can constitute a defense to the crime.¹⁴¹

she consented. It could not be committed if that essential *mens rea* were absent. Accordingly, if an accused in fact believed that the woman had consented, whether or not that belief was based on reasonable grounds, he could not be found guilty of rape

(ii) In the light of all the evidence, however, no reasonable jury could have failed to convict the appellants even if the jury had been properly directed. Accordingly, despite the misdirection, there had been no miscarriage of justice in respect of any of the appellants; the appeals would therefore be dismissed under the proviso to s 2(1) of the Criminal Act 1968.

Id. at 347.

¹³² *Id.*

¹³³ *Id.* at 347-62, 379-83. While each judge authors his own opinion, the most detailed majority opinion was written by Lord Hailsham.

¹³⁴ Sexual Offences Act, 1956, 4 Eliz. 2, ch. 69, § 1 (Eng.).

¹³⁵ *Id.*

¹³⁶ *Morgan*, 2 All E.R. at 353-62. Note that in defining rape and delineating a requisite *mens rea*, Lord Cross is exclusively concerned with how a male, or more particularly, an accused, would define rape. There is no discussion of how a victim would view rape. *Id.* at 352.

¹³⁷ *Id.* at 350.

¹³⁸ *Id.* at 364-65 and *supra* note 81.

¹³⁹ See *supra* notes 45-51, 66-80 and accompanying text.

¹⁴⁰ *Morgan*, 2 All E.R. at 364-65.

¹⁴¹ See *id.* at 370-80 (Edmund-Davies, L., dissenting).

The defendants maintained that rape occurs when a person intends to have intercourse with another who is not consenting.¹⁴² Here, the intent goes beyond contemplation of the act itself;¹⁴³ the defendant must not only think about the act of intercourse, but intend to continue the act, despite knowing the victim does not consent.¹⁴⁴ Therefore, an affirmative defense in this situation is not necessary.¹⁴⁵ Either the prosecution brings forth enough evidence to show the defendant's intent, or there must be an acquittal.¹⁴⁶

The House of Lords examined the element of *mens rea* under both definitions.¹⁴⁷ The opposing views were synthesized and evaluated in the following manner: "[i]f the words defining an offence provide either expressly or impliedly that a man is not to be guilty"¹⁴⁸ and if he believes something to be true, then he is not guilty "if the jury think that he may have believed it to be true, however inadequate were his reasons for doing so."¹⁴⁹ Alternately, if the words define the offense as absolute, a defense of mistaken belief must be reasonable.¹⁵⁰ The House of Lords rejected the state's absolute definition and found the offense of rape required some type of specific intent.¹⁵¹ The court framed its definition in the following context:

[T]o the question whether a man, who has intercourse with a woman believing on inadequate grounds that she is consenting to it, though she is not, commits rape, I think he would reply, 'No.' If he was grossly careless then he may deserve to be punished but not for rape.¹⁵²

Lord Cross of Chelsea stated, "[r]ape, to my mind, imports at least indifference as to the woman's consent . . . [t]hat being my view as to the meaning of the word 'rape' in ordinary parlance, I next ask myself whether the law gives it a different

¹⁴² *Id.* at 358.

¹⁴³ *Id.*

¹⁴⁴ *See id.* at 349.

¹⁴⁵ *See id.* at 357.

¹⁴⁶ *See id.*

¹⁴⁷ *See id.* at 356-67.

¹⁴⁸ *Id.* at 352.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

meaning.¹⁵³ The court found that there was little existing law that contradicted the definition given by Lord Cross, and used a common language definition of rape in its decision.¹⁵⁴

Because the court did not find rape to be an absolute offense, it held that a belief in consent did not necessarily have to be based on reasonable grounds.¹⁵⁵ To support this, Lord Hailsham of St. Marylebone stated:

A failure to prove this involves an acquittal because the intent, an essential ingredient, is lacking. It matters not why it is lacking if only it is not there, and in particular it matters not that the intention is lacking only because of a belief not based on reasonable grounds.¹⁵⁶

The majority held the two part instruction that the trial court gave to the jury was not necessary.¹⁵⁷ They found if a belief is honest, it does not matter whether its basis is reasonable or unreasonable.¹⁵⁸ The court determined that the formula for determining whether a defense is valid is honesty, not honesty plus reasonableness.¹⁵⁹ The court asserted that a requirement of reasonableness could act to impose an intent on a defendant where it might not exist.¹⁶⁰ In support of this contention, Lord Hailsham of St. Marylebone argued:

I believe that '*mens rea*' means 'guilty or criminal mind', and if it be the case, as seems to be accepted here, that the mental element in rape is not knowledge but intent, to insist that a belief must be reasonable to excuse it is to insist that either the accused is to be found guilty of intending to do that which in truth he did not intend to do, or that his state of mind, though innocent of evil intent, can convict him if it be honest but not rational.¹⁶¹

¹⁵³ *Id.*

¹⁵⁴ *See generally id.* at 352-62.

¹⁵⁵ *Id.* at 362.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 356. Lord Hailsham commented, "the crux of the matter, the factum probandum, or rather the fact to be refuted by the prosecution, is honesty and not honesty plus reasonableness. In making reasonableness as well as honesty an ingredient in this 'defence' the judge, say the appellants, was guilty of a misdirection." *Id.* The majority agreed.

¹⁵⁸ *Id.* at 362.

¹⁵⁹ *See id.* at 353-61 (Lord Hailsham's opinion).

¹⁶⁰ *Id.* at 352.

¹⁶¹ *Id.* at 357 (quoting *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462, [1935] All E.R. 1).

Based on this standard, the House of Lords upheld the convictions of the defendants.¹⁶² The court reasoned that it would have been impossible for the jury to find that the defendants honestly believed that Mrs. Morgan was consenting to sexual intercourse.¹⁶³ Since the court determined that there could not have been an honestly held belief to begin with, it held that the trial court instruction that the belief must be based on reasonable grounds only constituted harmless error.¹⁶⁴ The trial court's instruction did not prejudice the outcome of the trial, and the court dismissed the appeals accordingly.¹⁶⁵

B. *The Heilbron Report and Statutory Definition*

The *Morgan* decision created a frenzy of outrage both inside and outside Great Britain.¹⁶⁶ A legislative committee was immediately formed to assess the decision and to decide what action should be taken.¹⁶⁷ In making this evaluation, the committee's task was to view statistical reports on rape, examine the societal attitudes toward rape, and study the effects of rape on society.¹⁶⁸ The committee report, known as the Heilbron Report, agreed with the *Morgan* decision and made two specific recommendations:¹⁶⁹

¹⁶² See *id.* at 353, 362, 383.

¹⁶³ See *id.* at 353-62.

¹⁶⁴ *Id.*

¹⁶⁵ See *id.* at 353, 362, 383.

¹⁶⁶ Victoria J. Dettmar, *Culpable Mistakes in Rape: Eliminating the Defense of Unreasonable Mistake of Fact as to Victim Consent*, 89 DICK. L. REV. 473, 491 (1989).

¹⁶⁷ REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, 1976, CMND 6352 [hereinafter HEILBRON REPORT]. "This inquiry originated as a result of the widespread concern expressed by the public, the media and in Parliament in regard to the decision of the House of Lords in *Director of Public Prosecutions v. Morgan & Others*." *Id.* at 1.

¹⁶⁸ *Id.* The Heilbron Report also dealt with other aspects of the rape issue: *mens rea* and drunkenness, protecting victim identity, evidence of past sexual history, and the possibility of creating a lesser offense.

¹⁶⁹ In addition to the recommendations which centered around *Morgan*, the Committee also made the following findings: that alleged victims should remain anonymous and the reporting of a victim[s] identity should be a crime; that evidence of a victim's past sexual history should be limited to cross-examination about relations with the accused; and that rape trial juries should have at least four members of both sexes. *Rape: Heilbron Draws a Veil*, THE ECONOMIST, December 13, 1975, at 32.

First, the *Morgan* court's conclusion that recklessness regarding consent is the *mens rea* required to support a rape conviction must be codified in order to prevent the rationale from being dismissed as dicta.¹⁷⁰ Second, a means by which a jury in a rape case determines whether the defendant honestly believed that the woman consented should be developed.¹⁷¹

In coming to the above conclusions, the Heilbron Committee first looked at the crime of rape itself. It acknowledged that there was no modern definition of rape, despite its listing as an offense under the Sexual Offences Act of 1956.¹⁷² Finding ambiguity in the existing definition, the Committee focused on four areas in an attempt to clarify the crime of rape.

First, the Committee stated that rape should center around a lack of consent, rather than the use of force.¹⁷³ Next, it found the *actus reus* in rape to consist of "(a) unlawful sexual intercourse and (b) absence of the woman's consent."¹⁷⁴ Then, it defined the *mens rea* as "an intention by the defendant to have sexual intercourse . . . either knowing that she does not consent, or recklessly not caring whether she consents or not."¹⁷⁵ Finally, the Committee declared that when a defendant contends that he mistakenly believed in the woman's consent, he is not bringing forth a defense to the crime; rather, he is arguing that the prosecution has failed to meet the *mens rea* element of the offense.¹⁷⁶

¹⁷⁰ HEILBRON REPORT, *supra* note 167, at 14; see Dettmar, *supra* note 166, at 492. Note that in the 1976 codification, there is a slight nuance. Part (2) explains that a jury is to have regard for the presence or absence of reasonable belief; at first this seems inconsistent with the holding in *Morgan*. However, this section deals with the evidence given to the jury; it does not address whether or not this evidence can be a defense to guilt.

¹⁷¹ Dettmar, *supra* note 166, at 492. Parliament used the *Morgan* decision as its model and basis for authority in drafting Great Britain's modern definition of the crime of rape.

¹⁷² HEILBRON REPORT, *supra* note 167, at 3. The Committee noted that the traditional common law definition of rape still in use was derived from a 17th century writing by Nathan Hale. "[R]ape consists in having unlawful sexual intercourse with a woman without her consent, by force, fear or fraud." HEILBRON REPORT, *supra* note 167, at 3.

¹⁷³ HEILBRON REPORT, *supra* note 167, at 3.

¹⁷⁴ HEILBRON REPORT, *supra* note 167, at 3.

¹⁷⁵ HEILBRON REPORT, *supra* note 167, at 3. The Committee also noted that the burden is on the prosecution to establish both the *actus reus* and *mens rea* elements of the crime.

¹⁷⁶ HEILBRON REPORT, *supra* note 167, at 4.

The Committee then examined the *Morgan* case itself. After reviewing the facts of the case, it briefly discussed the historical background preceding *Morgan*.¹⁷⁷ The Committee asserted that *Morgan* should be viewed under the light of fundamental principles of criminal law.¹⁷⁸ The principle focused on in particular was "that a man must be morally blameworthy before he can be found guilty of a crime - that is to say he must have meant to do what the law forbids or been reckless in not caring whether he did it or not."¹⁷⁹ From this, the Committee evaluated the subjective and objective methods for determining the accused's intent.¹⁸⁰ It immediately rejected the objective approach, citing *Director of Public Prosecutions v. Smith*.¹⁸¹

After reaching its conclusion that the subjective approach should be the method used to determine the existence of *mens rea*, the Heilbron Committee addressed what it felt was the main issue in *Morgan*: "Whose mind must be guilty? The mind of the defendant or that of a hypothetical reasonable man?"¹⁸²

¹⁷⁷ HEILBRON REPORT, *supra* note 167, at 7-8.

¹⁷⁸ The Committee proclaimed that these were concepts "which have been shaped and refined over centuries by Parliament and the Courts to accord with the changing moral standards of society." HEILBRON REPORT, *supra* note 167, at 7.

¹⁷⁹ HEILBRON REPORT, *supra* note 167, at 7. The Committee maintained that the principle of man being criminally culpable for acts or omissions that were accidental or unintentional is archaic and outdated, and should only exist today in traditional strict liability crimes. HEILBRON REPORT, *supra* note 167, at 8.

¹⁸⁰ HEILBRON REPORT, *supra* note 167, at 8-9.

¹⁸¹ 3 All E.R. 161 (1960). This case involved the death of a police officer and the issue of whether or not a person could be convicted of murder if he did not intend serious bodily injury. See *supra* notes 92-99 and accompanying text. The Committee criticized the *Smith* decision, claiming that intent should have been determined by what was in the mind of the accused, rather than by "the intention of a purely hypothetical reasonable man." HEILBRON REPORT, *supra* note 167, at 8. The Committee maintained that section 8 of the Criminal Justice Act of 1967 was enacted in response to *Smith*. It provides that:

A court or jury, in determining whether a person has committed an offence -
 (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but

(b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

Criminal Justice Act, 1967, ch. 80, § 8 (Eng.). The Committee uses this as authority for a subjective approach to *mens rea* and hail it as a "landmark in the development of the criminal law with its concern for the liberty of the subject." HEILBRON REPORT, *supra* note 167, at 9.

¹⁸² HEILBRON REPORT, *supra* note 167, at 9.

In answering this question, the Committee used circular reasoning which closely paralleled the majority in *Morgan*.¹⁸³ It found a mistaken belief, albeit erroneous, negatives the requisite *mens rea* for rape. Conversely, a jury's belief that the accused either knew or was reckless as to lack of consent negatives the existence of any mistake on the part of the accused.¹⁸⁴

Finally, the Heilbron Report addressed the issue of whether or not a mistaken belief in consent had to be based on reasonable grounds.¹⁸⁵ In rejecting this requirement, the report cited the following reasons: a genuine mistake alone negates *mens rea*; juries with a "strong sense of fairness" may hesitate to convict where there was no deliberate or reckless violation; and that the imprecise and varied nature of sexual relationships would make it difficult for a jury to articulate a reasonable man standard.¹⁸⁶ The overall findings in the report supported the majority decision in *Morgan*. Further, the report defended the majority by attempting to answer various criticisms of the case.¹⁸⁷ The Heilbron Report cautioned that those concerned with the standards involved in rape law should be concerned with criminal culpability of the accused and the deprivation of his liberty, rather than the harm inflicted.¹⁸⁸

¹⁸³ See *Morgan*, 2 All E.R. at 352, 357.

¹⁸⁴ *Id.*

¹⁸⁵ HEILBRON REPORT, *supra* note 167, at 9-10. The report cited the argument supporting the reasonableness requirement as follows: "it is said that this additional requirement is necessary because women should be protected from the carelessness or negligence of men in ascertaining their wishes, and that if the conduct of the accused fell short of the standard of a reasonable man, he should be found guilty of rape." HEILBRON REPORT, *supra* note 167, at 10.

¹⁸⁶ HEILBRON REPORT, *supra* note 167, at 10. The Committee also noted that its additional propositions regarding procedural and evidentiary changes might convince some critics to abandon their arguments for a negligence standard of *mens rea* and an objective standard of determination. HEILBRON REPORT, *supra* note 167, at 10.

¹⁸⁷ HEILBRON REPORT, *supra* note 167, at 10-11. For example, the Committee asserted that the *Morgan* decision did not stand for the proposition that a person was entitled to be acquitted, "no matter how ridiculous his story might be." HEILBRON REPORT, *supra* note 167, at 11. Further, it maintained that the reasonableness was not irrelevant; rather, it is part of the evidence which the jury may choose to accept or not accept. HEILBRON REPORT, *supra* note 167, at 11.

¹⁸⁸ HEILBRON REPORT, *supra* note 167, at 12.

As a result of the Heilbron Report, *Morgan's* common law decision was codified in the Sexual Offences Act of 1976, section 1,¹⁸⁹ which defined rape in the following manner:

(1) A man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time 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 she consents to it. . .

(2) It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a 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.¹⁹⁰

IV. ANALYSIS

A. *The Controversy in Morgan*

The *Morgan* decision is controversial in three respects. First, it established a subjective standard for proving the existence or absence of the intent to commit the offense of rape, regardless of the objective evidence.¹⁹¹ A subjective standard of proof relies on what is going on inside the defendant's mind, rather than the actual reality of the circumstances. Although the legal system does not want to punish a person who does not have a guilty mind, the subjective standard of proof often ignores the fact that a crime has been committed. Every crime has a victim, and the subjective standard fails to encompass the victim's perceptions and right to justice.

Second, it categorized rape as a specific intent crime, making the standard of proof much higher than what would be necessary to prove a general intent.¹⁹² Specific intent generally designates a ". . . special mental element which is required

¹⁸⁹ Sexual Offences Act, 1976, ch. 82, § 1 (Eng.).

¹⁹⁰ *Id.* Note that the final wording of the Act closely parallels the recommendations made by the Advisory Committee. HEILBRON REPORT, *supra* note 167, at 14.

¹⁹¹ See J.A. Coutts, *Developments in Recklessness*, 48 J. CRIM. L. 87 (1984); Alec Samuels, *Consent: Rape*, 127 SOLICITORS J. 742 (1983). But see Simon Gardner, *Reckless and Inconsiderate Rape*, 1991 CRIM. L. REV. 172 (1991) (arguing that the *Morgan* decision was not the victory that subjective theorists claimed it to be).

¹⁹² For an explanation of specific intent versus general intent, see Lord Simon's opinion. *Morgan*, 2 All E.R. at 362-67.

above and beyond. . ." any general intent with respect to the criminal act.¹⁹³ By requiring specific intent, objective evidence that the victim did not, in fact, consent to the intercourse would not be sufficient for a conviction. Specific intent, in effect, forces the prosecution to adduce evidence as to what was going on in the defendant's mind.

Third, it sent the message that the legal rights of the accused were to be protected to a greater degree than the legal rights of the victim in rape cases.¹⁹⁴ The *Morgan* court's assessment of criminal liability failed to appropriately consider the subjective perceptions of the victim and the objective evidence presented. A subjective standard of proof and classification of rape as a specific intent crime will allow the legal rights of a victim to fall through the cracks of the criminal justice system.

The *Morgan* decision is doctrinally flawed because it claims to formulate a standard of *mens rea* in rape grounded in pure legal theory.¹⁹⁵ Legal theory cannot exist in a vacuum. Throughout the development of the criminal justice system, law and morality have gone hand in hand. The evolution of legal theory with regard to crime and punishment turns on what society perceives as wrong. However, the *Morgan* court tries to turn a blind eye to this when the court uses archaic societal perceptions of rape to justify its theory. Further, the *Morgan* court contradicts established legal theory by abandoning the reasonableness requirement of a mistaken belief defense exclusively for the offense of rape.¹⁹⁶ The *Morgan* court used a subjectivist the-

¹⁹³ BLACKS LAW DICTIONARY 1339 (6th 3d. 1990).

¹⁹⁴ Lord Simon argues in the dissent that a reason for requiring a mistaken belief to be reasonable is to strike a balance between the rights of the victim and the rights of the accused. *Id.* at 367. "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." *Id.*

¹⁹⁵ The majority asserts that its basis for a subjective standard of determining *mens rea* is that the crime of rape differs from other types of crimes where a mistaken belief is required to be reasonable. *See supra* notes 116-65 and accompanying text. However, the author submits that this line of legal reasoning cannot stand on its own. Rather, the majority fashioned its legal theory around their interpretation of the meaning of the word "rape" itself. When Lord Cross gave his definition of rape, the Court had no choice but to read an additional *mens rea* requirement into the offense of rape. *See supra* notes 153-54 and accompanying text.

¹⁹⁶ In his opinion, Lord Edmund-Davies points to *Tolson* in setting forth general principles embedded in criminal law:

ory of intent in finding that an honest belief alone can act to negate the *mens rea* in rape offenses.¹⁹⁷ Under this view, levels of intent like "knowledge" and "recklessness" are used inconsistently as standards for mental culpability.¹⁹⁸ While the subjectivist approach couches recklessness in terms of risk and foresight, it is difficult to define the *Morgan* court's use of the term.¹⁹⁹

Part of the problem in understanding the *Morgan* notion of recklessness is the court's ordinary language definition of rape. The court stated that a man who had intercourse with a woman based on an inadequate belief in consent would not say that he has committed rape.²⁰⁰ This line of reasoning reflects a traditionally masculine perception of rape. While a man who acts on an unreasonable belief in consent will not believe that he has committed rape, a woman who is subjected to the act of sexual intercourse without her consent will believe that she has been raped, regardless of the mental state of the aggressor.²⁰¹ Because of the definition used by the House of Lords, it follows that its characterization of *mens rea* and recklessness also reflects masculine perceptions.

The term "recklessness" within traditional subjectivist thinking is outlined as encompassing several different states of

At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim, "actus non facit reum, nisi mens sit rea."

Morgan, 2 All E.R. at 377 (quoting *Tolson*, 58 L.J.R. at 105).

[A] mistake of facts on reasonable grounds, to the extent that, if the facts were as believed, the acts of the prisoner would make him guilty of no offence at all, is an excuse, and that such an excuse is implied in every criminal charge and every criminal enactment in England.

Morgan, 2 All E.R. at 377 (citing *Tolson*, 58 L.J.R. at 110). "[T]he absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent." *Morgan*, 2 All E.R. at 377 (citing *New South Wales v. Piper*, [1897] A.C. 383, 389-90).

¹⁹⁷ See generally Goode, *supra* note 115.

¹⁹⁸ See Goode, *supra* note 115, at 467. For example, in Lord Hailsham's opinion, he uses both of these words interchangeably to describe the requisite intent for rape.

¹⁹⁹ See Goode, *supra* note 115, at 467.

²⁰⁰ See *supra* note 152 and accompanying text.

²⁰¹ R.A. Duff, *Recklessness and Rape*, 3(2) LIVERPOOL L. REV. 49, 56 (1981).

mind, which can be divided into four categories.²⁰² First, "[t]he defendant realises that the woman may not be consenting but hopes that she is."²⁰³ Second, "[t]he defendant realises that the woman may not be consenting but is determined to have intercourse with her regardless."²⁰⁴ Third, "[t]he defendant is so intent on having intercourse with the woman, that although it occurs to him that she may not be consenting, he suppresses the thought, and deliberately closes his mind to the risk."²⁰⁵ Fourth, "[t]he defendant does not advert to the issue of consent at all. His mind is a total blank."²⁰⁶

The *Morgan* holding only allows liability for recklessness under the first three circumstances.²⁰⁷ Under the fourth situation, the accused has no belief at all. The *Morgan* court reasoned that there must be some sort of positive belief in order for any *mens rea* to exist at all.²⁰⁸

Further, there are two other scenarios where the accused would not be termed reckless under *Morgan*: "[t]he defendant believes that the woman is consenting. It does not occur to him that she might not be."²⁰⁹ In this situation, the man has a belief in consent and does not consider the risk. Regardless of why he has that belief, he does not consider that she may not consent. Second, "[t]he defendant, having realised that the woman might not be consenting, wrongly and quite unreasonably concludes that she is."²¹⁰ Here, the possibility of non-consent is in the

²⁰² Jennifer Temkin, *The Limits of Reckless Rape*, 1983 CRIM. L. REV. 5 (1983).

²⁰³ *Id.* In this situation, the man thinks that the woman may not be consenting, but wants the intercourse to be consensual and thus disregards the thought.

²⁰⁴ *Id.* In this situation, the man thinks that the woman may not be consenting, but does not care. He will continue with the intercourse regardless of the existence or absence of consent from the woman.

²⁰⁵ *Id.* In this situation, the man wants to have sex but knows that he shouldn't unless the woman also wants to have sex. If he refuses to think about the risk of non-consent, then it cannot subjectively exist.

²⁰⁶ *Id.* at 6. In this situation, the man gives absolutely no thought to the issue of consent.

²⁰⁷ See Duff, *supra* note 201, at 53. Duff interprets *Morgan* as including "only those who either know that she does not consent or suspect this and would persist even if they knew it." Duff, *supra* note 201, at 53.

²⁰⁸ *Morgan*, 2 All E.R. at 352.

²⁰⁹ See Temkin, *supra* note 202, at 6.

²¹⁰ Temkin, *supra* note 202, at 6.

man's mind. However, his skewed perception of the circumstances lead him to believe that she is.

Allowing any of the above scenarios to defy criminal liability is objectionable because each of them should be regarded as instances of reckless conduct. Recklessness should not have to involve an actual awareness of a risk that the woman does not consent.²¹¹ Sexual intercourse must be viewed as a "consensual act between partners, both of whose interests are integrally involved."²¹² The consent of the parties is essential; it is not a contingent circumstance.²¹³ When intercourse is viewed in this light, inadvertence to the issue of consent or an unreasonable belief in the existence of consent constitutes reckless conduct for several reasons.

First, it is not acceptable to be mistaken about a woman's consent because the essence of the sex act should derive from "two actively interested participants in a mutually consensual activity."²¹⁴ The attitudes of the two parties with regard to sexual intercourse defines the act and its boundaries. To argue that one was mistaken as to consent or did not even think about the issue shows a lack of regard for a woman's interest in the sex act.

Second, in most situations of rape (like in *Morgan*), the lack of consent is "objectively demonstrated"²¹⁵ by either resistance, express dissent, or other circumstances²¹⁶ that make it difficult for the victim to resist.²¹⁷ In these situations, the aggressor acts in the face of objective evidence that the woman is not consenting.²¹⁸

Third, the mistake of belief in consent is essentially connected to the sexual act itself.²¹⁹ A claim that consent is only contingently related to the act views women as a means to an end, rather than a partner with an equal interest in the activ-

²¹¹ See generally, Duff, *supra* note 201, at 54.

²¹² Duff, *supra* note 201, at 56.

²¹³ Duff, *supra* note 201, at 56.

²¹⁴ Duff, *supra* note 201, at 58.

²¹⁵ Duff, *supra* note 201, at 58 (quoting Lord Simon in *Morgan*).

²¹⁶ These circumstances can include fraud, unconsciousness, bondage, or some form of force or coercion against the victim. Duff, *supra* note 201, at 52-53.

²¹⁷ Duff, *supra* note 201, at 58, 59.

²¹⁸ Duff, *supra* note 201, at 59.

²¹⁹ Duff, *supra* note 201, at 59.

ity. When sexual relationships are viewed in this context, "any account of the mens rea of rape must rest on an account of the kind of attention a man should pay to, the kind of concern he should have for, the woman's consent, and must thus express a moral view about the proper nature of sexual relationships."²²⁰

In sum, the subjective standard used by the *Morgan* court allows the criminal justice system to focus on the rights of the accused, rather than the victim. The primary focus of rape laws should be the protection of the victim's rights to bodily privacy and retribution. In this light, the actions that result from inadvertence or an unreasonably held belief in consent are too violative to be attributed to any standard below recklessness.²²¹

The 'negligent rapist' who is intent on intercourse without attending to the possibility that the woman does not consent, or who is prepared to take another's word, or his own preconceptions, as adequate grounds for his belief in her consent, displays what must be counted, on any proper moral view of the significance of her consent, as a serious disregard for her consent and her sexual interests.²²²

An objective standard of *mens rea* in rape would serve two purposes. First, it would not allow inadvertence as to consent or an unreasonable belief in consent to negate intent. Second, it would allow an honestly held belief in consent based on reasonable grounds to negate intent in situations where it may truly not exist. The *Morgan* dissent argued for an objective standard in evaluating a mistaken belief defense.²²³

Lord Simon wrote a dissenting opinion in *Morgan*.²²⁴ He believed that the court was wrong in applying a subjective standard of proof to *mens rea*.²²⁵ Instead, he endorsed the objectiv-

²²⁰ Duff, *supra* note 201, at 59.

²²¹ Duff, *supra* note 201, at 58; see generally Temkin, *Towards a Modern Law of Rape*, 45 MODERN L. REV. 399 (1982).

²²² See Duff, *supra* note 201, at 60-61.

²²³ *Morgan*, 2 All E.R. at 362-67. Note that this only deals with Lord Simon's opinion. Lord Edmund-Davies, who also dissented, did not advocate an objective standard but felt obligated to dissent based on existing precedent.

²²⁴ *Id.*

²²⁵ *Id.* at 365. Lord Simon argued that

[P]roof of sexual intercourse with a woman who did not consent to it - will generally be sufficient prima facie proof to shift the evidential burden. If the evidential burden shifts in this way, the accused must either prove that his conduct was involuntary (which is irrelevant in the crime of rape) or he

ist approach.²²⁶ He explained that crimes requiring some standard of *mens rea* either involved a general or an ulterior intent.²²⁷ If the mental element of the offense was attached to the act itself, then only a basic intent was required.²²⁸

Lord Simon disagreed with the majority and asserted that rape was a basic intent crime.²²⁹ With basic intent crimes, a *prima facie* showing beyond a reasonable doubt that a certain fact existed also acts to make a *prima facie* showing of intent.²³⁰ Therefore, once the prosecution puts forth sufficient evidence that a woman did not consent, the evidentiary burden should shift to the accused to negate or deny *mens rea*.²³¹ This burden could be met by a showing that the accused honestly manifested a mistaken belief in consent that was based on reasonable grounds.²³²

'The rationale of reasonable grounds for the mistaken belief must lie in the law's consideration that a bald assertion of belief for which the accused can indicate no reasonable ground is evidence of insufficient substance to raise any issue requiring the jury's consideration.' I agree; but I think there is also another reason. 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.²³³

The objective standard of proof for *mens rea* in rape protects the victim in several ways. First, it does not excessively rely on what the defendant asserts was going on in his mind. It allows any objective evidence of non-consent, as well as the vic-

must negative the inference as to *mens rea* which might be drawn from the actus reus.

Id.

²²⁶ See Goode, *supra* note 115, at 501.

²²⁷ See *Morgan*, 2 All E.R. at 363-65. Basic intent crimes encompass those "whose definition expresses . . . a *mens rea* which does not go beyond the *actus reus*." *Id.* at 363. Crimes of ulterior intent require some type of *mens rea* beyond the contemplation of the actus reus. *Id.* at 364.

²²⁸ See Goode, *supra* note 115, at 501. Lord Simon further explains that in a basic intent crime, "[t]he actus reus generally consists of an act and some consequence . . . the *mens rea* does not extend beyond the act and its consequence, however remote, as defined in the actus reus." *Morgan*, 2 All E.R. at 363.

²²⁹ Goode, *supra* note 115, at 501.

²³⁰ Goode, *supra* note 115, at 501.

²³¹ Goode, *supra* note 115, at 501.

²³² Goode, *supra* note 115, at 501.

²³³ *Morgan*, 2 All E.R. at 367 (quoting *Regina v. Morgan*, 1 All E.R. 8, 14 (C.A. 1974)).

tims perceptions, to be put in front of the jury. Second, it forces the law to adapt to a broader view of equality in sexual relationships by refusing to allow inadvertence as to consent or an unreasonable belief in consent as a defense. Third, it holds rapists to a higher standard of culpability and provides a more just scale of retribution.

However, the objective standard is also sufficient to safeguard the interests of the accused. The defendant will not be convicted on the subjective hearsay of an accuser. The state must meet a high burden of showing objective evidence beyond a reasonable doubt that the victim did not consent in order to make a *prima facie* case for rape. If this cannot be established, the case is automatically dismissed.

Thus, if there is enough objective evidence to show the victim did not consent, the objective approach provides for a defense. If the defendant can show he had reasonable grounds for believing in the victim's consent, the jury will acquit him. A jury of his peers will decide what is reasonable by current societal standards. This standard is fair because it provides a defense for certain circumstances of mistaken belief while maintaining a societal check on the defendant's actions.

V. DEVELOPMENT OF THE LAW AFTER *MORGAN*

The *Morgan* decision's attempt to clarify the use of the subjective standard when determining the existence or absence of *mens rea* for an offense was problematic. The House of Lords intended this decision to apply as a broad principle of criminal law. However, lower courts continued to require that an honestly held mistaken belief be reasonable to afford a defense in other areas of criminal law, applying *Morgan* only to rape cases.²³⁴ To date, no court has explicitly overruled *Morgan*.²³⁵ The more recent trend of cases dealing with *mens rea* appear to support *Morgan*. Nevertheless, there exists much confusion in the way courts are interpreting and applying *Morgan*. The following progeny of cases shows that most courts dealing with the

²³⁴ See *infra* notes 243-48 and accompanying text.

²³⁵ The holding in *Morgan* was codified by the Sexual Offences Act of 1976. Sexual Offences Act, 1976, ch. 82, § 1 (Eng.). However the courts still refer to *Morgan* for guidance as a common law case in understanding *mens rea* in rape and subjective intent.

issue of *mens rea* in rape view *Morgan* as a red herring, rather than embracing it as a bright line rule.

*Regina v. Cogan*²³⁶ was another similar rape case decided only a few months after *Morgan*. Here, defendant Cogan was convicted of raping Leak's wife and defendant Leak was convicted of aiding and abetting the rape.²³⁷ The circumstances are similar to *Morgan*. Leak came home drunk one night and asked his wife for money; she refused, and he attacked her.²³⁸ The next night he came home with Cogan. Both men were drunk.²³⁹ Leak told his wife that Cogan wanted to have sex with her, and that he would make sure it happened.²⁴⁰ Leak forced his wife to go upstairs and undress, whereby Leak and Cogan both raped her.²⁴¹ While Leak admitted that he had procured Cogan to sleep with his wife, Cogan maintained he believed Mrs. Leak consented.²⁴² The trial judge asked "the jury to make a finding whether any belief in consent which Cogan may have had was based on reasonable grounds."²⁴³

The jury convicted, saying that they felt Cogan had believed in Mrs. Leak's consent, but that the belief was not based on reasonable grounds.²⁴⁴ On appeal, the court followed the House of Lords reasoning in *Morgan* and reversed Cogan's conviction. Because the jury believed Cogan, he was allowed to go free. Leak's conviction was sustained, because he had intended for Cogan to rape his wife.²⁴⁵

²³⁶ 2 All E.R. 1059 (1975). This decision consolidated two cases. Defendant Leak was prosecuted in the same proceeding as Cogan.

²³⁷ *Id.* at 1060. While the facts show that Leak had also raped his wife, he was only charged with aiding and abetting due to the marital rape exemption.

²³⁸ *Id.* The evidence shows that the marriage was turbulent and marked by bouts of violence. *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* Leak's statement to the police indicated that he set up his wife to be raped "to punish her for past conduct." *Id.* at 1060-61.

²⁴¹ *Id.* at 1060. Both Cogan and Leak admitted that Mrs. Leak had been crying and sobbing during the intercourse. *Id.* at 1060-61.

²⁴² *Id.* at 1060-61. The basis for Cogan's belief was what Leak had told him. *Id.* at 1061. At no time did he speak with Mrs. Leak about her feelings.

²⁴³ *Id.* This was in accordance with the Court of Appeals decision in *Morgan*. *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 1062. This result is exactly what critics of *Morgan* feared would happen. Cogan, who in fact raped Mrs. Leak, did not bear any criminal responsibility for his actions. While Leak himself was rightly convicted, it does not account for Cogan's behavior, which was reckless. Ironically, the Court of Appeal explained

In 1981, *Regina v. Phekoo*²⁴⁶ purported to keep the principles of *Morgan* confined strictly to rape.²⁴⁷ This case involved a landlord-tenant dispute. The defendant tried to kick the complainants off the property and was subsequently convicted of harassment.²⁴⁸ On appeal, the defendant claimed he should not be found guilty since he honestly believed the tenants were not actual occupants, and that the trial judge erred in failing to instruct the jury as to this belief.²⁴⁹ The Court of Appeals agreed that a specific intent to harass needed to be proved, but disagreed with the defendant's contention that his intent should be determined by a subjective standard.²⁵⁰ Instead, the court found that when self-defense is asserted, a defendant has to show he had reasonable grounds in his honest belief.²⁵¹

The next case involving a significant discussion of *mens rea* was *Regina v. Caldwell*.²⁵² The defendant, in a drunken state, set fire to a hotel after having a fight with the manager.²⁵³ He was convicted of arson under the Criminal Damage Act of 1971, which stated that a person was guilty where he was "reckless as to whether the life of another would thereby be endangered."²⁵⁴ In defining "reckless," the court stated that a person is reckless if:

the injustice appropriately. "One fact is clear - the wife had been raped . . . [t]he fact that Cogan was innocent of rape because he believed she was consenting does not affect the position that she was raped." *Id.* at 1062.

²⁴⁶ 1 W.L.R. 1117 (C.A. 1981).

²⁴⁷ *Id.* at 1127. In 1981, the Court of Appeal also declined to apply *Morgan* in *Albert v. Lavin*, 1 All E.R. 628 (1975) (holding that in an assault case, it was not a defense that the accused honestly but mistakenly believed that his action was justified as self-defense if there were no reasonable grounds for his belief).

²⁴⁸ *Phekoo*, 1 W.L.R. at 1119.

²⁴⁹ *Id.* at 1121. Defendant asserted that the trial judge erred in finding the defendant's belief to be irrelevant. *See id.* at 1120-21.

²⁵⁰ *See id.* at 1127.

²⁵¹ *Id.* at 1127-28. The court attempts to distinguish this case from *Morgan* in two ways. First, it declares that the principles espoused in *Morgan* should be confined to rape law. *Id.* at 1127. Second, it explained that this was a situation where a mistaken belief would be considered a defense, rather than going to prove the absence of an element of the offense (as was claimed in *Morgan*). *Id.* at 1128.

²⁵² [1982] App. Cas. 341 (1981).

²⁵³ *Id.* at 343.

²⁵⁴ *Id.* The defendant had pleaded guilty to the first section of the Act, admitting that he intended to destroy property, but maintained that he had no intent to put people's lives in danger. *Id.*

- (1) he does an act which in fact creates an obvious risk that property will be damaged or destroyed; and
- (2) when he does the act he either has not given any thought as to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it.²⁵⁵

This definition of reckless differs significantly from the one proposed in *Morgan*. The *Caldwell* definition finds culpability in a defendant that has not given any thought to a situation, or who has perceptions of his own act that do not conform with the societal view. Under the *Caldwell* definition, a person is considered reckless if he did not give any thought to the surrounding circumstances or if he realized the risk involved and acted anyway. The *Morgan* standard would not have found mental culpability in those situations. However, the *Caldwell* definition has not been explicitly extended to rape cases. Thus, defendants who fit in the above categories may still be exempted from criminal liability for rape.

The next case involving rape after *Cogan* to reach the appellate level was *Regina v. Pigg*.²⁵⁶ The victims in this case were teenagers who had snuck away from sleepaway camp to have a drink at a local bar.²⁵⁷ The defendant, posing as a camp official, attacked the girls when they returned.²⁵⁸ Subsequently, the defendant was indicted on one count of rape and one count of attempted rape.²⁵⁹ At trial, the defendant maintained that a rape had not taken place because the complainants had consented.²⁶⁰

²⁵⁵ *Id.* at 354. The court also noted its dislike of the focus on subjective and objective standards in recklessness, stating that "questions of criminal liability are seldom solved by simply asking whether the test is subjective or objective." *Id.*

²⁵⁶ 1 W.L.R. 762 (C.A. 1982). More accurately, *Pigg* is the next rape case discussing issues of *mens rea*. In 1981, the Court of Appeal decided *Regina v. Olugboja*, 3 All E.R. 443 (1981) (dealing with the *actus reus* issue of whether it is sufficient to prove that the victim did not, in fact consent, or if the element requires a showing of force, fear of force, or fraud).

²⁵⁷ *Pigg*, 1 W.L.R. at 764.

²⁵⁸ *Id.* In describing the attack, the court said that the defendant grabbed one of the girls by the throat and declared, "I'm the Yorkshire Ripper." *Id.* The defendant then subjected the victims to "a catalogue of almost every sexual indignity of which one can think." *Id.*

²⁵⁹ *Id.* at 763-64. The defendant was actually convicted of two counts of attempted rape and one count of indecent assault. *Id.* at 764.

²⁶⁰ *Id.* at 765.

In the jury instructions, the judge remarked "the prosecution had to prove either that the appellant knew the complainants did not consent or he was reckless as to whether or not they consented; and that a man was reckless if he was aware of the possibility that the complainants might not be consenting but nevertheless went ahead."²⁶¹ The defendant was convicted, but raised the issue on appeal that the judge misdirected the jury as to the standard of recklessness.²⁶² In considering the defendant's contentions, the Court of Criminal Appeals did not rely extensively on the case law developed in *Morgan*.²⁶³ As a result, the court came up with the following definition of recklessness:

[A] man is reckless if either he was indifferent and gave no thought to the possibility that the woman might not be consenting in circumstances where if any thought had been given to the matter it would have been obvious that there was a risk she was not, or, that he was aware of the possibility that she might not be consenting but nevertheless persisted regardless of whether she consented or not.²⁶⁴

The appellate court's reasoning in *Regina v. Kimber*²⁶⁵ extended the principles of *Morgan* to indecent assault. In *Kimber*, the defendant sexually assaulted a female patient in a mental hospital.²⁶⁶ Although the alleged victim was mentally deficient, the defendant claimed at trial that he believed the woman had consented.²⁶⁷ The trial judge directed the jury that the only is-

²⁶¹ *Id.* at 768.

²⁶² *Id.* at 767. The definition of rape that the defendant invited the court to adopt was as follows: "[w]here a man has sexual intercourse with a woman who does not consent to it when he appreciates from the situation that a real risk exists that she is not consenting and nonetheless carries on with the act." *Id.* at 769.

²⁶³ See generally *id.* at 770-72. The court did not use the *Morgan* definition of reckless. Rather, the court looked at the Sexual Offences Act of 1976, *Regina v. Caldwell*, [1982] App. Cas. at 341, and *Regina v. Lawrence*, 2 W.L.R. 524 (1981) in determining whether the defendant was reckless.

²⁶⁴ *Id.* at 772. This was significant because it expanded the *Morgan* view of recklessness to include a defendant who did not give any thought to the situation.

²⁶⁵ 1 W.L.R. 1118 (C.A. 1983).

²⁶⁶ *Id.* at 1120.

²⁶⁷ *Id.* at 1121. He also gave testimony that he was indifferent to the complainant's feelings. *Id.*

sue to consider was whether in fact the woman had consented, and that the defendant's belief was not a defense.²⁶⁸

Defendant appealed, contending that the issue for the jury was whether he honestly believed that she consented.²⁶⁹ The state conceded that the trial judge's instructions were incorrect, but argued that the issue should be whether the defendant's beliefs were reasonable.²⁷⁰ The Court of Appeals found that, technically, the jury was misdirected by the trial court's instructions because the jury was not left to consider the issue of whether the defendant had a genuine belief in consent.²⁷¹ However, the court upheld the conviction because it felt that since the defendant had admitted he was indifferent to the complainant's feelings, no jury would have found that he had an honest belief in consent.²⁷²

Later in 1983, the Court of Criminal Appeals decided the case of *Regina v. Satnam*.²⁷³ In *Satnam*, the defendants were convicted of raping a thirteen year old girl.²⁷⁴ Again, the defendants claimed the victim consented.²⁷⁵ On appeal, they contended that the judge failed to properly instruct the jury on the mental element of recklessness.²⁷⁶ The trial judge instructed the jury that with respect to the element of recklessness, it was a risk "obvious to an ordinary observer" that the girl was not consenting.²⁷⁷ In overturning the convictions, the Court of Appeals showed some support for *Morgan*, finding that the judge's

²⁶⁸ *Id.* In this case, the trial judge was concerned with *actus reus*, not *mens rea*.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 1123.

²⁷² *Id.* This is similar to what the House of Lords did in *Morgan*. Rather than applying the principles they extended, the court upheld a conviction because a miscarriage of justice was not done.

²⁷³ 78 Cr. App. 149 (1983).

²⁷⁴ *Id.* at 150. One of the defendants was a co-worker of the victim. He offered to give her a ride to work the day the attack took place. *Id.*

²⁷⁵ *Id.* at 151. When the defendants were interviewed by police, Satnam said the following, "[b]ut when I tried to have sex Kewal held her arms down because she pushed me away. . . I am very sorry for what I have done. Elizabeth never asked for sex; we took advantage of her, but Kewal is strong - she couldn't stop him." *Id.*

²⁷⁶ *Id.* at 151.

²⁷⁷ *Id.*

failure to instruct as to an honest belief was inadequate.²⁷⁸ However, the court did admit confusion in applying recklessness after the *Pigg, Caldwell*, and *Lawrence* decisions. On these grounds, the defendants went free.

In *Regina v. Taylor*,²⁷⁹ the appellate court added a new twist to the existing law. The trial judge in *Taylor* refused to give a jury instruction regarding an honest but mistaken belief in consent,²⁸⁰ giving the defendant a basis for appeal. On this issue, the court announced that "there is no general requirement that such a direction should be directed in all cases of rape."²⁸¹ The court found the evidence did not warrant a direction as to an honest belief in consent.²⁸² Rather, the court reasoned that the facts did not support this contention.²⁸³ Further, the court opined that a jury would have convicted him anyway and the failure to give the instruction was harmless error.²⁸⁴

Almost twenty years after *Morgan*, the law regarding rape remains inconsistent. The courts in Great Britain have failed to articulate a legal premise explaining whether or not the *mens rea* in rape is different from that of other offenses, and if so, why. The reluctance of the court to change the law shows a lack

²⁷⁸ *Id.* at 152. Although they found the jury instructions to be inadequate, it did not agree with the defendant's contention that the judge should have instructed the jury that for recklessness, the prosecution had to prove that each defendant was actually aware of the possibility that the victim was not consenting. See *id.* at 154-55.

²⁷⁹ 80 Cr. App. 327 (1984).

²⁸⁰ *Id.* at 330.

²⁸¹ *Id.* The court maintained that the nature of the evidence would determine whether such a direction would be appropriate. *Id.* at 330-31.

²⁸² See *id.* at 331.

²⁸³ *Id.* at 332. The court felt that once the jury decided that the complainant was telling the truth, there was not much room for an honest but mistaken belief by the defendant. *Id.*

²⁸⁴ *Id.* There are two final rape cases in the *Morgan* progeny. First, *Regina v. Fotheringham*, [1989] 88 Cr. App. 206 (1988). This case dealt with an aspect of *mens rea* not dealt with in *Morgan* - self-intoxication. Defendant was convicted of raping his children's 14 year old babysitter. He claimed that he was so drunk at the time, he thought he was having sex with his wife. The jurors were instructed to ask themselves whether there were reasonable grounds for the defendant to believe that he was having sex with his wife. *Id.* at 209. The defendant appealed, and the court dismissed the case, holding that self-induced intoxication did not provide a mistaken belief defense, reasonable or not. *Id.* at 212.

Second, *Regina v. Khan*, 1 W.L.R. 813 (C.A. 1990) (dismissing the appeals of three defendants convicted of the attempted rape of a sixteen year old and holding that the same principles apply to both rape and attempted rape).

of understanding that its aim should be to serve the broader interests of modern society by protecting a victims' rights to privacy, bodily integrity, and retribution for the crime committed.

The law of rape in the past existed for the protection of property rights, rather than for the protection of women.²⁸⁵ Historically, redress for the crime of rape was monetary compensation for the theft of another man's property.²⁸⁶ The punishment has changed, but the argument can still be made that rape law does not exist for the protection of women.²⁸⁷ The current law reflects the attitude that it is better to preserve the reputation of an accused man than to have the rights of the victim vindicated.²⁸⁸

VI. CONCLUSION

In sex crimes against women, particularly rape, there continues to be a stagnating attitude towards recognizing the rights of women's safety and bodily integrity under the law. Although there has been some progress, there is still not an adequate reflection of equality under the law in the protection against sex crimes. *Morgan* and its progeny have failed the victims of rape in many ways. The rape victim is unsure of how she stands under the law, because the standards for proving the *mens rea* of her attacker remain indecisive, impractical and unfair.

First, it is a mistake to classify rape as a specific intent offense. The *actus reus* of rape should be sexual intercourse with a person who is not, in fact, consenting. If the prosecution can show that the intercourse was intentional, then the *mens rea* should be satisfied. It is impossible to distinguish between crimes where evidence of *mens rea* goes to an element of the offense as opposed to a defense at law. The issue of what amounts to proof of *mens rea* by the prosecution remains uncertain. Allowing a defendant to put forth evidence of mistaken belief as to the circumstances to show that the prosecution has not proved *mens rea* only provides an additional handicap.

²⁸⁵ Temkin, *supra* note 221, at 401.

²⁸⁶ Temkin, *supra* note 221, at 400-01.

²⁸⁷ *Id.*

²⁸⁸ See generally Temkin, *supra* note 221, at 282.

Second, the subjective standard for determining *mens rea* forces the prosecution to adduce what is going on in the defendant's mind. What the subjective standard does, in essence, is bring all of the evidence down to the issue of credibility. If the defendant testifies and his beliefs seem plausible, a jury is likely to acquit him, because only he can really explain what is going on in his mind. This is the wrong way to approach *mens rea* in rape. Sex carries with it a high degree of responsibility. There is nothing wrong in holding a person accountable for his actions by requiring that they are reasonable. An objective standard of proof for *mens rea* in sex offenses is the best way to bring about a balance between the rights of the accused and the rights of the victim.

Third, the definition of reckless rape varies from case to case. It remains unclear as to what state of mind must exist for a person to be reckless. Using an objective standard for determining *mens rea* would act to alleviate this problem. It is a fair proposition to have the standard of recklessness in a particular situation measured by the standards of a reasonable person. Otherwise, cases of rape that do not show a knowledge of lack of consent or at least indifference will fall through the cracks of the system. These should not be the only situations where a rapist can be seen as criminally culpable.

Finally, a definition of rape as a basic intent crime, along with an objective standard for determining *mens rea* and a broader view of recklessness will help to bridge the gap between the protections afforded to a defendant and the rights of the victim in rape cases. It is a unique crime in that the physical, psychological and social consequences suffered by the victim are overwhelming. The dichotomy between the male and female perceptions of rape must be brought together to reflect a more balanced view of rape. There are situations where a person who gives no thought to whether or not a woman is consenting during intercourse is reckless. There are situations where the indignities suffered by the victim require that retribution and punishment be a significant goal in prosecution.

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