Florida Journal of International Law

Volume 32 | Issue 1 Article 1

September 2020

Reforming the Law of Rape in the United States: Some Advice from the Antipodes

Dr. Andrew Hemming

REFORMING THE LAW OF RAPE IN THE UNITED STATES: SOME ADVICE FROM THE ANTIPODES

*Dr. Andrew Hemming**

This Article sets out a comprehensive model provision for the crime of rape by defining the specified fault elements, such as knowledge and recklessly, within the provision. In particular, the definition of recklessly incorporates a requirement that the person took reasonable steps to ascertain consent. The model provision also addresses the twin issues of intoxication and mistake of fact, with the aim of making the fault elements of the crime of rape more objective.

INTRODUCTION

The purpose of this Article is to set out a comprehensive model provision for the crime of rape that can be incorporated into all criminal jurisdictions in the United States. This is in part achieved by defining the specified fault elements, such as knowledge and recklessness, within the

* Associate Professor in Law, University of Southern Queensland.

provision. One objective of this Article is to show that it is possible to reform key criminal offenses in the United States in a uniform manner, by drawing on the more progressive legislative provisions for rape in Australia. Apart from addressing the current inconsistencies and inadequacies in rape provisions in the United States, the proposed model provision is also designed to clarify the vexed question of whether the defendant reasonably believed the victim was consenting. In this way, it is hoped that in the future some of the well-known difficulties in securing a conviction for rape, where it is often one person's word versus another's against a standard of proof of beyond reasonable doubt, may be reduced through the comprehensiveness and clarity of the statutory language employed in the model provision.

This Article recognizes that in seeking to identify a model provision for rape it may be objected that the more comprehensive the statutory language employed, the greater the opportunity for diverse interpretations with a consequent loss of clarity. This criticism is met by the argument that comprehensiveness and clarity are not mutually exclusive. On the contrary, by deliberately incorporating defined fault elements, the treatment of mistake of fact and intoxication into the model provision, the operation of the provision is clarified. Given such a comprehensive approach, it will be argued that despite any differences in the framework and statutory construction between the criminal regimes in Australia and the United States, such differences are minimized in the treatment of rape by limiting the meaning of the specified fault elements and the operation of the "defenses" of mistake of fact and intoxication to the relevant division of the respective Criminal Code.

For the offense of rape (sexual intercourse without consent) this Article addresses three questions: (1) whether in the search for consistency in the vitiating factors for consent, the better approach is to specifically identify a detailed list of vitiating factors or to prefer more general provisions that rely on judicial discretion based on the facts of the case in the tradition of the common law; (2) how to ensure the consistency of the reach of the fault elements, particularly the scope of the definition of recklessness or reckless indifference and the threshold for criminal responsibility; and (3) how to ensure consistency in the operation of the "defenses" of mistake of fact and intoxication. Given that the crime of rape has a strong subjective component in terms of whether the complainant believed lack of consent had been clearly communicated and understood by the accused, the overall purpose of this Article is twofold: (1) to make the test for mistaken belief in consent more objective by requiring the accused to have taken positive steps to ascertain consent; and (2) to make the process of adjudging guilt for rape more objective by making the test one of whether an ordinary sober person in similar

circumstances to the accused would have reasonably concluded that free and voluntary consent had been given.

I. AN AUSTRALIAN BENCHMARK FOR DEFINING THE OFFENSE OF RAPE

A. *Australia's Criminal Law Landscape*

Australia has a very disparate mosaic of criminal laws with nine criminal law jurisdictions. Unlike Canada, which has a single Criminal Code,[1] Australia's criminal laws are State-based and can broadly be grouped as either Code States and Territories,[2] or common law States.[3] Superimposed above State legislation is Commonwealth legislation,[4] and the distinction relates to the powers given to the Commonwealth under Section 51 of the Federal Constitution.[5] In respect to giving the responsibility for criminal laws to the individual States, Australia is similar to the United States.

It is necessary to explain the key differences in Criminal Code architecture in Australia in order for the reader in the United States to understand how the various rape provisions have been constructed. This brief summary will commence with the "Griffith Code" States of Queensland, Western Australia, and Tasmania. In the Griffith Codes, offenses are defined by reference to conduct and circumstances, which may occasionally include the existence of a specific state of mind. The architecture of the Griffith Codes was designed to avoid the specification of a fault element in an offense. Instead, the absence of a fault element is

1. *See* Canada Criminal Code, R.S.C. 1985, c C-46.

2. The Australian Code States and Territories are Queensland (1899), Western Australia (1902), Tasmania (1924), the Northern Territory (1983), and the Australian Capital Territory (2002). Queensland, Western Australia, and Tasmania are known as "Griffith Code" States after Sir Samuel Griffith and share a common Code architecture.

3. The Australian common law States are New South Wales, Victoria, and South Australia, although each of these States have a significant amount of statutory law. *See Crimes Act 1900* (NSW); *Crimes Act 1958* (Vic); *Criminal Law Consolidation Act 1935* (SA).

4. See, for example, the *Criminal Code Act 1995* (Cth) ch 2. The Northern Territory and the Australian Capital Territory have adopted Chapter 2 of the Criminal Code Act, which deals with criminal responsibility and includes definitions of physical elements (ch 2 sub-div 4.1), and fault elements (ch 2 sub-div 5.1). Consequently, the Northern Territory and the Australian Capital Territory have a very different Code architecture to the "Griffith Code" States of Queensland, Western Australia, and Tasmania.

5. *See, e.g.*, *Australian Constitution* s 51 (listing the legislative powers of the Federal Parliament). So, for example, the Commonwealth's capacity to deal with drug offenses under the Customs Act, 1901 (Cth), is based on two heads of power under the Constitution: the trade and commerce power and the external affairs power. *Australian Constitution* s 51. Other relevant heads of power for federal criminal offenses include: taxation; postal, telegraphic, telephonic, and other like services; quarantine; fisheries in Australian waters beyond territorial limits; currency, coinage, and legal tender; and copyrights, patents of inventions and designs, and trademarks. *Id.*

stated as a matter of defense or excuse.[6] Consequently, the offense of rape is defined in Section 349(1) of the *Criminal Code 1899* (Qld) in these terms: "Any person who rapes another person is guilty of a crime."[7]

By contrast, the architecture of the *Criminal Code 1995* (Cth), which is based on the United States Model Penal Code (1962) and has been followed by the Northern Territory and the Australian Capital Territory, specifically defines both physical elements and fault elements in Part 2.2 of Chapter 2.[8] The formula adopted is that an offense consists of physical and fault elements. Physical elements can be conduct, a result of conduct, or a circumstance in which conduct, or a result of conduct, happens. Fault elements can be intention, knowledge, recklessness, or negligence, all of which are defined.[9] Thus, Section 192 of the *Criminal Code 1983* (NT), which deals with sexual intercourse without consent, is written in terms that reflect the architecture of the *Criminal Code 1995* (Cth). For present purposes, dealing with the specification of fault elements, the relevant sub-sections are Sub-Section 192(3) and Sub-Section 192(4A):

> (3) A person is guilty of an offense if the person has sexual intercourse with another person:
>
> (a) without the other person's consent; and
>
> (b) knowing about or being reckless as to the lack of consent.
>
> (4)(A) For subsection (3) being reckless as to a lack of consent to sexual intercourse includes not giving any thought to whether or not the other person is consenting to the sexual intercourse.[10]

---

6. See, for example, "Intention–Motive" of the Queensland *Criminal Code Act*, which states:

> (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for (a) an act or omission that occurs independently of the exercise of the person's will; or (b) an event that (i) the person does not intend or foresee as a possible consequence; and (ii) an ordinary person would not reasonably foresee as a possible consequence.

1899 (Qld) s 23(1).

7. *Criminal Code Act 1899* (Qld) s 349(1) (Austl.). *See also Criminal Code Act Compilation Act 1913* (WA) s 325 ("A person who sexually penetrates another person without the consent of that person is guilty of a crime . . . ."); *Criminal Code Act 1924* (Tas) s 185(1) ("Any person who has sexual intercourse with another person without that person's consent is guilty of a crime.").

8. *Criminal Code 1995* (Cth), ch 4.1 and 5.1.

9. *Id.* at ch 3–5.

10. *Criminal Code Act 1983* (NT) s 192(3), (4A) (Austl.).

It can be seen that the two alternative fault elements are knowledge or recklessness, and that recklessness is further defined as including "not giving any thought to whether or not the other person is consenting to the sexual intercourse."[11]

The remaining three jurisdictions in Australia are New South Wales, Victoria, and South Australia, which are referred to as "common law" States, although each of these States also has significant statutory law: *Crimes Act 1900* (NSW); *Crimes Act 1958* (Vic); and *Criminal Law Consolidation Act 1935* (SA). As will be discussed in later sections, these "common law" States have the most progressive legislation dealing with rape and provide the bedrock of the advice from the Antipodes in reforming the law of rape in the United States.

B. *The Consistency of the Vitiating Factors for Consent*

In the various criminal law jurisdictions in Australia, a consistent definition of "consent" in the context of sexual offenses has emerged, namely, a person is consenting when he or she gives "free and voluntary agreement."[12]

The circumstances in which a person does not consent to sexual intercourse as set out in Australian criminal law jurisdictions are broadly similar, but there are some significant variations which require attention. Given the common thread that runs through the lists of these circumstances negating consent, it is unfortunate that such variations exist. Thankfully, they are easily remediable. The position taken in this Article is that the more exhaustive and comprehensive the list of circumstances, the greater the clarity; this is especially true if the list is buttressed by examples, such as the one used in Section 46(3)(h) of the *Criminal Law Consolidation Act 1935* (SA) discussed below.

In seeking a starting point in the selection of a criminal law jurisdiction in Australia that sets out a comprehensive list of factors or circumstances that vitiate consent, Sub-Section 36(2) of the *Crimes Act 1958* (Vic) below stands out. Furthermore, the sub-section commences by specifically stating that the list is not closed, thereby leaving open the possibility of the exercise of judicial discretion to expand the number of circumstances under which consent is vitiated based on a factual matrix not originally envisaged or foreseen by those who drafted the legislation.

> (2) Circumstances in which a person does not consent to an act include, but are not limited to, the following—

---

11. *Id.*

12. *Criminal Code Act 1995* (Cth) s 268.14(3); *Crimes Act 1900* (NSW) s 61HE(2); *Criminal Code Act 1983* (NT) s 192(1); *Criminal Code Act 1899* (Qld) s 348(1); *Crimes Act 1958* (Vic) s 36(2); *Criminal Code Act 1924* (Tas) s 2A(1); and *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a). *See also Criminal Law Consolidation Act 1935* (SA) s 46(2).

(a) the person submits to the act because of force or the fear of force, whether to that person or someone else;

(b) the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal;

(c) the person submits to the act because the person is unlawfully detained;

(d) the person is asleep or unconscious;

(e) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;

(f) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;

Note

This circumstance may apply where a person gave consent when not so affected by alcohol or another drug as to be incapable of consenting.

(g) the person is incapable of understanding the sexual nature of the act;

(h) the person is mistaken about the sexual nature of the act;

(i) the person is mistaken about the identity of any other person involved in the act;

(j) the person mistakenly believes that the act is for medical or hygienic purposes;

(k) if the act involves an animal, the person mistakenly believes that the act is for veterinary, agricultural or scientific research purposes;

(l) the person does not say or do anything to indicate consent to the act;

(m) having initially given consent to the act, the person later withdraws consent to the act taking place or continuing.[13]

As would be expected, the drafters of the legislation took into account previous cases where the outcome was received with some disquiet, such

13. *Crimes Act 1958* (Vic) s 36(2).

as with Sub-Section 36(2)(j) which has statutorily reversed *R v Mobilio*[14] by providing that a person does not freely agree if they mistakenly believe that the act is for medical or hygienic purposes. The common law position in *Mobilio* was that the complainant was not mistaken as to the medical procedure to be performed, and therefore the penetration was not rape. The same logic applies if a person believing she or he has been through a marriage ceremony, then engages in sexual intercourse with her or his "married" partner in so far as the person is not mistaken as to the nature of the sexual act and is deemed not to be rape despite the fact that the person would not have consented if aware of the deception.

Australia usefully provides a statutory example in the equivalent to Victoria's Sub-Section 36(2)(j) above, namely, Sub-Section 46(3)(h) of the *Criminal Law Consolidation Act 1935* (SA):

> (h) the person is mistaken about the nature of the activity.
>
> Example—
>
> A person is taken not to freely and voluntarily agree to sexual activity if the person agrees to engage in the activity under the mistaken belief that the activity is necessary for the purpose of medical diagnosis, investigation or treatment, or for the purpose of hygiene.[15]

The above example could be inserted under Sub-Section 36(2)(j) of the *Crimes Act 1958* (Vic) which would helpfully explain how the Sub-Section is intended to operate.

Close examination of Sub-Section 36(2) of the *Crimes Act 1958* (Vic) reveals that the statutory language has a broad reach such as Sub-Section 36(2)(b) which covers the fear of harm of any type.[16] The use of the word "any" thereby includes non-physical threats such as economic reprisals, blackmail, and reputational damage. Another example of the use of the all-encompassing word "any" can be seen in Sub-Section 36(2)(i) where mistaken identity covers "any other person involved in the act."[17] A further example of the breadth of language employed can be seen in Sub-Section 36(2)(l) "the person does not say or do anything to indicate

14. (1991) 1 VR 339 (Austl.) (believing that penetration, by a medical instrument, was being undertaken for medical diagnostic purposes, the victim allowed it to occur; however, the procedure was unnecessary and engaged upon solely for the sexual gratification of the operator).

15. *Criminal Law Consolidation Act 1935* (SA) s 46(3)(h).

16. *Crimes Act 1958* (Vic) s 36(2)(b).

17. *Crimes Act 1958* (Vic) s 36(2)(i).

consent to the act."[18] In other words, even where the complainant is passive to the extent of not saying or doing anything as regards demonstrating consent, Sub-Section 36(2)(l) requires positive communication on the part of the defendant. This follows as Sub-Section 36(2)(l) treats implied consent as not being "free and voluntary agreement" because consent is required to be express consent, albeit either by word ("say") or deed ("do"). The defendant is unable to assume consent unless the complainant's words or deeds are positively explicit.

Sub-Section 36(2)(m) reflects the "continuing act" doctrine which effectively deals with the situation where a person changes her or his mind as regards engaging in sexual activity. Where the person initially gives consent to sexual penetration but subsequently withdraws consent, then under the "continuing act" doctrine, the offense of rape or sexual penetration without consent is committed.[19] Another relevant case to the same effect is *Kaitamaki v The Queen*,[20] where the Privy Council held that the actus reus of sexual intercourse was a continuing act, but that when the appellant realized consent was withdrawn and he therefore formed the *mens rea*, the necessary coincidence for criminal responsibility crystallized because he continued in the knowledge that the act was no longer consensual. This doctrine is analogous to a situation where a motorist may have accidently run over a policeman's foot when the policeman was directing the motorist to park in a certain position, but once the motorist ran over the policeman's foot and he directed the motorist's attention to his pain, the motorist refused to move the vehicle such was the case in *Fagan v Metropolitan Police Commissioner*.[21]

In stark comparison with Victoria, the least exhaustive list of factors vitiating consent is presently to be found in Western Australia under Sub-Section 319(2)(a) of the *Criminal Code Act Compilation Act* (WA) where "consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means."[22] This Article

18. *Crimes Act 1958* (Vic) s 36(2)(l).

19. *See R v Mayberry* [1973] Qd R 211, 212 (Austl.).

20. (1985) 1 AC 147 (Eng. & Wales).

21. [1969] 1 QB 439 (Eng. & Wales).

22. *Criminal Code Act Compilation Act* 1913 (WA) s 319(2)(a). The situation in the United States regarding "deceit, or any fraudulent means" is little better. *See, e.g.*, TENN. CODE ANN. § 39-13-503(a)(4) (2020) (stating that consent is vitiated if "the sexual penetration is accomplished by fraud"). *See also* TENN. CODE ANN. § 39-11-106(a)(9)(A) (2020) (stating that consent is not effective when "induced by deception or coercion"). The term "coercion" is defined in TENN. CODE ANN. § 39-13-501 (2020), which is a statute that defines certain terms found in the other Tennessee sexual offenses statutes, however neither of the terms "fraud" or "deception" are defined in that section. For a discussion of the limitations of the treatment of rape by fraud in criminal codes in the United States, see Michael Mullen, *Rape by Fraud: Eluding Washington Rape Statutes*, 41 SEATTLE U. L. REV. 1035 (2018). Mullen identifies rape by fraud as being

contends that such open ended drafting leads to a need for the Western Australian legislature to clarify the reach of the last part of Sub-Section 319(2)(a) as it relates to vitiation of consent for "deceit, or any fraudulent means." The obvious danger with such a broad definition is that it leaves open what is meant by deceit or fraud and could potentially encompass broken promises that the community would not consider vitiated consent to sexual intercourse, such as promising to buy a horse or jewelry in exchange for sexual intercourse.[23] Would, for example, a person who impersonated a police officer to induce a prostitute to offer her services for free or face "arrest," have committed rape?[24]

This Article argues that rather than use broad open-ended language which then requires judicial interpretation, legislatures should insert separate sections to address deceit and fraud. Thus, if a person's consent was conditional on the other person wearing a condom[25] or withdrawing his penis before ejaculating to avoid becoming pregnant,[26] acts colloquially referred to as "stealthing," then it is preferable and better defines criminal responsibility to have separate sections vitiating consent that cover such eventualities than to attempt to lump all manner of possibilities under an unconfined generic word as "fraud" or "misrepresentation," which is potentially an overreach of criminal responsibility. Under a criminal code which purports to contain the criminal law, the citizen should be able to read the code and understand where the lines of criminal responsibility are carved in the legislation.

The conclusion to be drawn from this analysis, as to the appropriate definition of circumstances where consent is vitiated, is that unlike other areas in the law of rape it would be a relatively straightforward matter to both standardize and make explicit the list of factors which vitiate consent

---

perpetrated across six general categories (with some overlap): (1) fraudulent treatment, such as fraudulent medical treatment to obtain sexual intercourse; (2) sexual impersonation; (3) sexual scams, such as impersonation of an agent in the entertainment industry; (4) sexual theft, such as refusal to pay a sex worker; (5) abuse of authority, such as educators, police, and employers utilizing their positions to leverage sexual complicity against victims; and (6) sexual extortion, where a person exploits his or her power derived from his or her relationship with the victim.

23. *See R. v. Winchester* [2011] QCA 374 ¶¶ 84–85 (Austl.).

24. *Michael v. State of Western Australia* [2008] WASCA 66 (Austl.).

25. *See Assange v. Swedish Prosecution Auth.* [2011] EWHC (Admin) 2849 (U.K.). *See also R. v. Hutchinson, 2014 SCC 19,* [2014] 1 S.C.R. 346 (Can.) (stating the appellant had sabotaged the condom by poking holes in the condom and the complainant became pregnant against her express wishes. The conviction was upheld on the basis that condom protection was an "essential feature" of the sexual activity, and therefore the complainant did not consent to the "sexual activity in question." Essentially, the Supreme Court of Canada preferred the view that there was no voluntary agreement by the complainant to engage in the "sexual activity in question," rather than taking the view that the condom sabotage constituted fraud with the result that no consent was obtained.).

26. *See R. v. DPP* [2014] QB 581 (U.K.).

for sexual offenses across Australian criminal law jurisdictions. The same reasoning applies to the United States.

The thrust of the argument being made here is that the benchmark or best practice for the list of circumstances vitiating consent needs to be as comprehensive (all encompassing) as possible, including the use of examples, without leaving the statutory language so open as to shed doubt as to the reach of the section such as in Sub-Section 319(2)(a) of the *Criminal Code Act Compilation Act* (WA) where the reach of the phrase "deceit, or any fraudulent means" has caused difficulty. This argument applies to all legislation, including in the United States, where the statutory language is open-ended and requires judicial interpretation. For Australia, it is suggested that the starting point for the design of a comprehensive list of factors which vitiate consent for sexual offenses is Sub-Section 36(2) of the *Crimes Act 1958* (Vic).

C. *The Consistency of the Fault Elements for Rape*

As a result of the mosaic of criminal law jurisdictions in Australia, with its mix of common law, statutes and codes, unsurprisingly an examination of the fault elements for rape across Australian jurisdictions reveals that there are marked differences in approach for the necessary mental elements to sheet home criminal responsibility, ranging from strict liability in the Griffith Codes to knowledge or recklessness. However, knowledge or recklessness are the fault elements for four Australian jurisdictions.[27] As such, knowledge and recklessness provide the base for building consistent fault elements for rape in Australia.

At this juncture in the analysis, it should be made clear that an examination of fault elements also includes out of necessity the treatment of mistake of fact and intoxication as defenses, even though on one view such defenses are not strictly fault elements. One reason for this approach is that the Griffith Codes of Queensland, Tasmania, and Western Australia, by failing to specify a fault element, effectively treat rape as a crime of strict liability.[28] The wording of these provisions yields the result that if sexual intercourse has taken place and consent is the issue, then mistake of fact is the only defense to a strict liability offense. In other words, the absence of a fault element forces the defendant to rely on the defense of mistake of fact, which has the effect of running a defense into the fault element. Reliance on mistake of fact can be buttressed with the defense of intoxication, especially if both parties had consumed alcohol or drugs at the time of the alleged sexual assault.

---

27. *Crimes Act 1900* (ACT) s 54; *Crimes Act 1900* (NSW) s 61HE; *Criminal Code Act* 1983 (NT) s 192(3); and *Criminal Law Consolidation Act 1935* (SA) s 48.

28. *Criminal Code Act 1899* (Qld) s 349; *Criminal Code Act 1924* (Tas) s 185; and *Criminal Code Act Compilation Act 1913* (WA) s 325.

1. Fault Elements

The starting point of this examination is to consider those jurisdictions that specifically identify knowledge and recklessness as fault elements for rape. Section 192 of the *Criminal Code 1983* (NT) has already been mentioned in Part A above dealing with Australia's criminal law landscape.[29]

In South Australia, Section 48(1) of the *Criminal Law Consolidation Act 1935* (SA), which deals with the crime of rape, like the Northern Territory, also specifies knowledge (awareness) and recklessness as alternative fault elements.

> 48—Rape
>
> (1) A person (the "offender") is guilty of the offense of rape if he or she engages, or continues to engage, in sexual intercourse with another person who—
>
> (a) does not consent to engaging in the sexual intercourse; or
>
> (b) has withdrawn consent to the sexual intercourse,
>
> and the offender knows, or is recklessly indifferent to, the fact that the other person does not so consent or has so withdrawn consent (as the case may be).[30]

The phrase "recklessly indifferent" in Sub-Section 48(1) above is defined in Section 47 of the *Criminal Law Consolidation Act 1935* (SA).

> 47—Reckless indifference
>
> For the purposes of this Division, a person is "recklessly indifferent to the fact that another person does not consent to an act, or has withdrawn consent" to an act, if he or she—
>
> (a) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility; or
>
> (b) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed; or

29. *See supra* note 10, Part I.A).

30. *Criminal Law Consolidation Act 1935* (SA) s 48(1).

> (c) does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.[31]

As can be seen, Section 47 of the *Criminal Law Consolidation Act 1935* (SA) specifies three alternative ways in which the fault element of "reckless indifference" is satisfied. Both Sub-Section 47(a) and Sub-Section 47(b) require an awareness of the possibility that the other person might not be consenting, either by proceeding regardless of that possibility (advertent recklessness) or by failing to take reasonable steps (an objective test) to ascertain whether the act is consensual before deciding to proceed (culpable inadvertence).[32] The third alternative, set out in Sub-Section 47(c), in which a person does not give any thought to consent before deciding to proceed, mirrors Sub-Section 192(4A) of the *Criminal Code Act 1983* (NT) discussed above in Part II.A. Judged by the criterion of comprehensiveness, Section 47 of the *Criminal Law Consolidation Act 1935* (SA), usefully covers the field and provides a model definition of the fault element of "recklessness."

Thus, a baseline position for ascribing criminal responsibility for rape (sexual intercourse without consent) would be to specify the alternative fault elements of "knowledge," and "recklessness" as found in the definition of "reckless indifference" contained in Section 47 of the *Criminal Law Consolidation Act 1935* (SA).[33]

This then invites comparison with the treatment of the fault elements of rape in New South Wales which also specifies the alternative fault elements of knowledge and recklessness in Sub-Sections 61HE(3) and (4) of the *Crimes Act 1900* (NSW).

> (3) Knowledge about consent
>
> A person who without the consent of the other person (the 'alleged victim') engages in a sexual activity with or towards the alleged victim, incites the alleged victim to engage in a sexual activity or incites a third person to engage in a sexual activity with or towards the alleged victim, knows that the alleged victim does not consent to the sexual activity if:
>
> (a) the person knows that the alleged victim does not consent to the sexual activity, or
>
> (b) the person is reckless as to whether the alleged victim consents to the sexual activity, or

31. *Id.* at s 47.
32. *See R. v. Banditt* [2004] NSWCCA 208 ¶¶ 78–79 (Austl.).
33. *See supra* note 28, at s 47.

> (c) the person has no reasonable grounds for believing that the alleged victim consents to the sexual activity.
>
> (4) For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case:
>
> (a) including any steps taken by the person to ascertain whether the alleged victim consents to the sexual activity, but
>
> (b) not including any self-induced intoxication of the person.[34]

Significantly, Sub-Section 61HE(3)(c) specifies an additional alternative fault element to knowledge and recklessness in the form of no reasonable grounds for believing the other person was consenting, which has the purpose of negating the defense of mistake of fact and will be further discussed in the next section.[35] Under Sub-Section 61HE(3) of the *Crimes Act 1900* (NSW), each of the three alternative fault elements as to consent (knowledge, recklessness, or no reasonable grounds for belief) are to be determined by all the circumstances of the case including any steps taken to ascertain consent, however self-induced intoxication is excluded.[36]

By contrast, the treatment of the offense of rape in the remaining Australian jurisdictions is inadequate, especially in the three Griffith Codes because of the failure to specify a fault element. However, of more significance is the failure to specify an objective test to ascertain whether or not the other person was consenting, given under the Griffith Codes the defendant must rely on the defense of mistake of fact. The need for an objective as opposed to a subjective test for mistake of fact is explained in the next section.

2. Mistake of Fact

Section 61HE(3)(c) of the *Crimes Act 1900* (NSW), discussed above, opens up the possibility of adding the fault element of "no reasonable grounds for believing" the other person was consenting to the baseline position previously identified of knowledge and reckless indifference contained in Section 47 of the *Criminal Law Consolidation Act 1935* (SA). The use of the word "reasonable" imports an objective test. The

---

34. *Crimes Act 1900* (NSW) s 61HE(3), (4).

35. *See Crimes Act 1900* (NSW) s 61HE(3)(c) (Austl.) (statutory statement of honest and reasonable, but mistaken, belief). *See also Bank of N.S.W. v. Piper* [1897] AC 383, 389-90 (Austl.) ("[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.").

36. *See Crimes Act 1900* (NSW) s 61HE(4).

term "no reasonable belief" is also to be found in Section 38(1)(c) of the *Crimes Act 1958* (Vic).

> Section 38 Rape
>
> (1) A person (A) commits an offense if—
>
> (a) (A) intentionally sexually penetrates another person (B); and
>
> (b) (B) does not consent to the penetration; and
>
> (c) (A) does not reasonably believe that B consents to the penetration.[37]

Reasonable belief in consent is defined in Section 36A of the *Crimes Act 1958* (Vic).[38] Section 36A(2) refers to any steps the person has taken to establish if the other person is consenting.[39]

Thus, Section 36A of the *Crimes Act 1958* (Vic) has the effect of replacing the excuse of mistake of fact (doing an act under an honest and reasonable, but mistaken, belief) for the purpose of establishing whether or not the other person was consenting to sexual intercourse. This is achieved by virtue of embedding a specific test within Section 36A of Part 1, Division 1-Offenses Against the Person, of the *Crimes Act 1958* (Vic), rather than relying on a generic mistake of fact provision across all Parts of the *Crimes Act 1958* (Vic).

3. Intoxication

As the person is often intoxicated at the time of the alleged offense, Sub-Section 36B(1)(a) of the *Crimes Act 1958* (Vic) deals with the effect of self-induced intoxication on reasonable belief.[40] The test is objective

---

37. *Crimes Act 1958* (Vic) s 38(1) (Austl.). Note that Section 38(1)(c)implies that intending to sexually penetrate another person is not usually in dispute. The issue is one of consent and whether A had a reasonable belief that B was consenting. Victoria has sought to minimize the reach of mistake of fact through an objective test.

38. *Crimes Act 1958* (Vic) s 36(A).

> Section 36A Reasonable belief in consent
>
> (1) Whether or not a person reasonably believes that another person is consenting to an act depends on the circumstances.
>
> (2) Without limiting subsection (1), the circumstances include any steps that the person has taken to find out whether the other person consents.

39. *Id.*

40. *See Crimes Act 1958* (Vic) s 36B(1)(a) (Austl.) (focusing on the relevance of evidence of intoxication as it relates to the mental element (*mens rea*), as opposed to the relevance of evidence of intoxication as it relates to a claim of mistaken belief as to the existence of consent).

in that the standard to be applied is that of a reasonable person who is not intoxicated.

> Section 36B Effect of intoxication on reasonable belief
>
> (1) In determining whether a person who is intoxicated has a reasonable belief at any time—
>
> (a) if the intoxication is self-induced, regard must be had to the standard of a reasonable person who is not intoxicated and who is otherwise in the same circumstances as that person at the relevant time.[41]

Thus, it can be seen that Section 36A and Section 36B work in tandem in that both sections contain objective tests. Section 36A requires that the circumstances surrounding the person's reasonable belief in consent is measured objectively by the steps the person took to ascertain consent, while Section 36B replaces the subjective belief of the intoxicated person with an objective standard of a reasonable person who is not intoxicated, which by virtue of Sub-Section 38(1)(c) above goes to the mental element ("A does not *reasonably believe* that B consents to the penetration") rather than mistake of fact.[42]

D. *Proposed Model Provision for Rape*

Consent means free and voluntary agreement[43] and the starting point for the design of a comprehensive list of factors which vitiate consent for sexual offenses is Sub-Section 36(2) of the *Crimes Act 1958* (Vic) above. As to the appropriate fault elements, reasonable belief in consent and the effect of self-induced intoxication, the following model provision for rape is proposed.[44]

> (1) A person is guilty of rape if the person has sexual intercourse with another person:
>
> (a) without the other person's consent; and
>
> (b) knowing about the lack of consent, or being recklessly indifferent as to the lack of consent, or having no reasonable grounds for believing the other person was consenting.

41. *Id.*

42. *Crimes Act 1958* (Vic) ss 36A, 36B, 38(1)(c) (Austl.).

43. *See* discussion *infra* Part I.B.

44. For a fuller treatment of this proposed model provision for rape, *see* Andrew Hemming, *In Search of a Model Provision for Rape in Australia*, 38(1) U. TAS. L. REV. 72 (2019).

(2) For the purpose of this sub-section, the following definitions apply:

(a) Knowledge: A person has knowledge of a result or circumstance if the person is aware that it exists or will exist in the ordinary course of events.

(b) Recklessly indifferent: a person is recklessly indifferent to the fact that another person does not consent to an act, or has withdrawn consent to an act, if he or she —

(i) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility; or

(ii) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed; or

(iii) does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.

(3) For the purpose of sub-section (1)(b), reasonable belief in consent depends on the circumstances known to a person at the time and includes any reasonable physical or verbal steps a person has taken to ascertain whether the other person is consenting.

Example

Where a person forms a belief about consent in ambiguous circumstances, such as where the other person is very tired or adversely affected by alcohol, without taking reasonable physical or verbal steps to determine if the other person consents.

Standard

At a minimum, it will be reasonable for the defendant to take at least some physical or verbal steps to find out whether the other person is consenting.

> (4) In determining whether a person who is intoxicated is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, or has a reasonable belief at any time, if the intoxication is self-induced, regard must be had to the standard of a reasonable person who is not intoxicated and who is otherwise in the same circumstances as that person at the relevant time.

The justification for such a broad provision for the offense of rape (sexual intercourse without consent) is: (1) comprehensiveness; (2) clarity; (3) consistency; and (4) maximizing the reach of criminal responsibility for rape by the inclusion of objective tests. These objective tests are found in the definition of the fault element of "recklessly indifferent;" in the reasonable steps test to ascertain whether the other person is consenting; and in the standard of the reasonable person who is not intoxicated. The overall purpose is to make the test of mistaken belief in consent more objective and less subjective, as well as to make the process of adjudging guilt for rape more objective.

Having examined relevant rape provisions in Australia and set out a proposal for a comprehensive model provision for the crime of rape, the next Part will consider rape offenses in the United States, with a view to establishing whether the proposed model provision above both could and should be incorporated into all criminal jurisdictions in the United States.

II. RAPE OFFENSES IN THE UNITED STATES

A. *United States Model Penal Code*

There is a general academic consensus that, prior to the Model Penal Code of 1962, "substantive criminal law . . . was often archaic, inconsistent, unfair, and unprincipled."[45] The Model Penal Code stimulated the widespread revision and codification of the substantive criminal law of the United States. One of the Model Penal Code's objectives was to simplify and rationalize common law offense definitions.[46] Under the Model Penal Code, an offense consists of physical and mental (fault) elements.[47] Physical elements can be conduct, a result of conduct, or a related circumstance.[48] The Model Penal Code

45. Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L. REV. 943, 947 (1999) (citing Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1100–01 (1952)). *See also* Joshua Dressler, *The Model Penal Code: Is It Like a Classic Movie in Need of a Remake?*, 1 OHIO STATE J. CRIM. L. 157, 157 (2003); Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 322–23 (2007).

46. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 334 (2007).

47. *See generally id.*

48. *Id.*

specifies four fault elements: purpose, knowledge, recklessness or negligence.[49] The Model Penal Code was an exhaustive attempt to match, in a binary geometric pattern, a physical element with a requisite fault element. The *Criminal Code 1995* (Cth) discussed in Part II is based on the Model Penal Code.

This design sought to remove the confusion as to the *mens rea* of a given offense, within the common law, by breaking down a criminal offense into objective elements with a specified mental state.[50] This breakdown was a radical change. The division of the amorphous term *mens rea* into just four defined mental states both simplified the law and gave the legislature, rather than the judiciary, control over criminal law. However, setting out offense elements is but the first step in ascribing criminal liability.

Further, under Article 3, the Model Penal Code states that justification —such as necessity, execution of public duty, and self-protection—is an affirmative defense.[51] Even if the conduct is unjustified under Article 3, there remains the final step under the excuse defenses in Article 2 (such as mistake, intoxication, or duress)[52] or the responsibility defenses in Article 4 (such as mental disease or defect, excluding responsibility).[53]

For present purposes, knowingly and recklessly are defined in the Model Penal Code in Section 2.02(2)(b) and (c), respectfully, as:

> 2.02 General Requirements of Culpability.
>
> (2) Kinds of Culpability Defined.
>
> (b) Knowingly.
>
> A person acts knowingly with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
>
> (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.
>
> (c) Recklessly.
>
> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial

49. MODEL PENAL CODE § 2.02(2) (AM. L. INST. 1984).
50. *See* Robinson & Dubber, *supra* note 45, at 335.
51. MODEL PENAL CODE §§ 3.01–.04 (AM. L. INST. 1984).
52. *Id.* §§ 2.04, .08, .09.
53. *Id.* § 4.01.

> and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.[54]

Similarly, mistake of fact is covered in Section 2.04(1):

> 2.04 Ignorance or Mistake.
>
> (1) Ignorance or mistake as to a matter of fact or law is a defense if:
>
> (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or
>
> (b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.[55]

The excuse defense of mistake of fact is bound up with the consent defense which goes to the heart of a rape defense, namely, that the defendant honestly (*bona fide*) and reasonably believed the prosecutrix[56] was consenting. Importantly, Section 2.04(1)(b) provides for a subjective test in the form of "the state of mind established by such mistake" to constitute a defense.[57]

B. *Impact and Judicial Interpretation of Model Penal Code*

One view of the impact of the rape and sexual assault provisions of the Model Penal Code (MPC) can be found in a Women's Law Project published in 2012.[58]

Written in 1962, the MPC defines rape as "sexual intercourse with a female not his wife" by force or threat of severe harm.[59] Under the MPC's terms, rape is not a felony of the first degree if there is no serious bodily harm or if the victim was a voluntary social companion and had

---

54. MODEL PENAL CODE § 2.02(2) (AM. L. INST. 1984).

55. MODEL PENAL CODE § 2.04 (AM. L. INST. 1984).

56. A female victim of a crime on whose behalf the state is prosecuting a suspect.

57. MODEL PENAL CODE *supra* note 55, at §2.04(1)(b).

58. *See* Carol E. Tracy et al., *Rape and Sexual Assault in the Legal System*, Women's Law Project and AEquitas, 5–6 (June 5, 2012), https://www.womenslawproject.org/wp-content/uploads/2016/04/Rape-and-Sexual-Assault-in-the-Legal-System-FINAL.pdf [https://perma.cc/4QX5-LDXD].

59. MODEL PENAL CODE § 213.1 (AM. L. INST. 1980).

previously permitted "sexual liberties."[60] The MPC includes the long outdated requirements of resistance, reporting of the sex crime to the police within three months, and corroboration of a victim's testimony as well as age-related provisions that are inconsistent with contemporary understanding of adolescent sexual abuse.[61]

Sweeping sex crime law reform began in the 1970s.[62] Feminists rejected the notion that women are the property of men without independent legal status or rights and demanded changes in the laws. As a result of this activism, most states have expanded the definitions of sex crimes to eliminate disparities based on gender and marital status. They have also rescinded the requirements of resistance, corroboration, and reporting requirements and prohibited introduction of a woman's past sexual history.[63] It is now well-established that penetration of orifices other than the vagina is a felony. Issues of force and consent continue to change but clear trends in the evolution of the law are identifiable. The definition of force is broadening beyond overt physical force alone to include other modes of coercion. There is an increasing recognition that penetration without consent or any additional force beyond penetration is a serious sexual offense.[64] These trends demonstrate the growing understanding that unwanted and unconsented to bodily invasion is the core wrong that sex crimes laws must address.[65]

An example of the trends in sexual offenses law reform can be found in Section 261 of the California Penal Code. It can be seen that Section 261 does not specify a fault element for the offense of rape, or define rape as an act of sexual intercourse without consent.[66] Instead, the absence of consent is implied by virtue of the act of sexual intercourse being accomplished under a list of circumstances such as by means of force or where the person was asleep.[67]

---

60. *Id.*

61. *Id.* §§ 213.1, .6.

62. *See* Brief for A Woman's Place Civil Legal Assistance Program et al. as Amici Curiae Supporting Appellant at 19-21, *Reedy v. Evanson*, 615 F.3d 197 (3d Cir. 2010) (No. 2:06-cv-1080).

63. These laws are known as "rape shield" laws and prohibit the introduction of the victim's past sexual history unless it is with the accused.

64. *See, e.g.*, CAL. PENAL CODE § 263 (2020) ("The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime."); OKLA. STAT. ANN. tit. 21, § 1113 (2020).

65. *See, e.g.*, *State in the Interest of M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992).

66. *See, e.g.*, CAL. PENAL CODE § 261 (2020).

67. Similarly, under FLA. STAT. § 794.011(4)(b) (2019) "a person 18 years of age or older who commits sexual battery upon a person 18 years of age or older without that person's consent, under any of the circumstances listed in paragraph (e), commits a felony of the first degree." Paragraph (e) of Section 794.011, lists a number of circumstances which vitiate consent which *inter alia* include (e)(1) the victim is physically helpless to resist; (e)(2)-(3) the offender coerces

(a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:

(1) Where a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code), the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent.

(2) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.

(3) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused.

(4) Where a person is at the time unconscious of the nature of the act, and this is known to the accused. As used in this paragraph, "unconscious of the nature of the act" means incapable of resisting because the victim meets any one of the following conditions:

(A) Was unconscious or asleep.

(B) Was not aware, knowing, perceiving, or cognizant that the act occurred.

(C) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact.

(D) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose.

---

the victim to submit; (e)(4) the offender administers a substance to the victim which incapacitates the victim; and (e)(6) the victim is physically incapacitated.

> (5) Where a person submits under the belief that the person committing the act is someone known to the victim other than the accused, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief.
>
> (6) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph, "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.
>
> (7) Where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official. As used in this paragraph, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.
>
> (b) As used in this section, "duress" means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.
>
> (c) As used in this section, "menace" means any threat, declaration, or act which shows an intention to inflict an injury upon another.[68]

On the issue of consent, California Penal Code Section 261.6 defines "consent" as positive cooperation,[69] Section 261.7 states that a communication to the defendant to use a condom without more does not constitute consent,[70] and Section 266c covers the situation where consent was procured by pretense to induce fear which would cause a reasonable

68. CAL. PENAL CODE § 263 (Deering 2020).
69. CAL. PENAL CODE § 261.6 (2020).
70. CAL. PENAL CODE § 261.7 (2020).

person in like circumstances to act contrary to the person's free will (objective test).[71]

> Section 261.6.
>
> In [rape] prosecutions . . . in which consent is at issue, "consent" shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. A current or previous dating or marital relationship shall not be sufficient to constitute consent where consent is at issue in a [rape] prosecution. . . .[72]
>
> Section 261.7.
>
> In [rape] prosecutions . . . in which consent is at issue, evidence that the victim suggested, requested, or otherwise communicated to the defendant that the defendant use a condom or other birth control device, without additional evidence of consent, is not sufficient to constitute consent.[73]
>
> Section 266c.
>
> Every person who induces any other person to engage in sexual intercourse, sexual penetration, oral copulation, or sodomy when his or her consent is procured by false or fraudulent representation or pretense that is made with the intent to create fear, and which does induce fear, and that would cause a reasonable person in like circumstances to act contrary to the person's free will, and does cause the victim to so act, is punishable by imprisonment in a county jail for not more than one year or in the state prison for two, three, or four years.
>
> As used in this section, "fear" means the fear of physical injury or death to the person or to any relative of the person or member of the person's family.[74]

In terms of instructions to the jury, the California Penal Code is supplemented by the Judicial Council of California Criminal Jury

71. CAL. PENAL CODE § 266c (2020).

72. CAL. PENAL CODE § 261.6 (2020); *Cf.* FLA. STAT. § 794.011(1)(a) (2019) ("'Consent' means intelligent, knowing, and voluntary consent, and does not include coerced submission. 'Consent' shall not be deemed or construed to mean the failure by the alleged victim to offer physical resistance to the offender.").

73. CAL. PENAL CODE § 261.7 (2020).

74. CAL. PENAL CODE § 266c (2020).

Instructions (CALCRIM).[75] CALCRIM sets out the elements of the crime of rape that the prosecution must prove, and as in Australia, consent is defined as free and voluntary agreement.[76]

The CALCRIM instruction for rape or spousal rape by force, fear, or threats reads:

> To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1. The defendant had sexual intercourse with a woman;
>
> 2. He and the woman were (not married/married) to each other at the time of the intercourse;
>
> 3. The woman did not consent to the intercourse;
>
> AND
>
> 4. The defendant accomplished the intercourse by
>
> <Alternative 4A—force or fear>
>
> [force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the woman or to someone else.]
>
> <Alternative 4B—future threats of bodily harm>
>
> [threatening to retaliate in the future against the woman or someone else when there was a reasonable possibility that the defendant would carry out the threat. A threat to retaliate is a threat to kidnap, falsely imprison, or inflict extreme pain, serious bodily injury, or death.]
>
> <Alternative 4C—threat of official action>
>
> [threatening to use the authority of a public office to incarcerate, arrest, or deport someone. A public official is a person employed by federal, state, or local government who has authority to incarcerate, arrest, or deport. The woman must have reasonably believed that the defendant was a public official even if he was not.]
>
> Sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis. [Ejaculation is not required.]

75. Jud. Council of Cal. Advisory Comm. on Crim. Jury Instructions, CALCRIM No. 1000, *in* JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS 749, 749 (2020).

76. *Id.* at 713.

> [To consent, a woman must act freely and voluntarily and know the nature of the act.][77]

The instruction, which also covers the defense of reasonable belief in consent, further states:[78]

> [The defendant is not guilty of rape if he actually and reasonably believed that the woman consented to the intercourse [and actually and reasonably believed that she consented throughout the act of intercourse]. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman consented. If the People have not met this burden, you must find the defendant not guilty.]

The Bench Notes in CALCRIM give the following instructional duty regarding the defense of reasonable belief in consent.[79]

> Defenses—Instructional Duty
>
> The court has a *sua sponte* (of its own accord) duty to instruct on the defense of reasonable belief in consent if there is "substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not." (See *People v. Williams* (1992) 4 Cal.4th 354]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal. Rptr. 745, 542 P.2d 1337].)

In *People v. Williams*,[80] the California Supreme Court took the opportunity to consider its own previous authority in *People v. Mayberry*.[81] The leading judgment for the majority was given by Arabian J.[82]

---

77. *Id.*

78. *Id.* at 750.

79. *Id.* at 751.

80. *Williams*, 841 P.2d 961, 964 (Cal. 1992).

81. *Mayberry*, 542 P.2d 1337 (Cal. 1975).

82. *Mayberry*, 841 P.2d at 964–66. For a critique of *People v. Williams*, see Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815, 815 (1996). Cavallaro states that:

> By allowing the defense only where the evidence of consent is "equivocal," courts are establishing a standard for an instruction of mistake that has been applied in no other context in which the mistake defense arises. This new rule of equivocality imposes limits on the role of the jury that are unique to rape, adding the defense of mistake of fact to a growing array of procedural and substantive rules of law that have singular application to that offense.

> In *People* v. *Mayberry* . . . this court held that a defendant's reasonable and good faith mistake of fact regarding a person's consent to sexual intercourse is a defense to rape. . . . *Mayberry* is predicated on the notion that under section 26,[83] reasonable mistake of fact regarding consent is incompatible with the existence of wrongful intent. . . .
>
> The *Mayberry* defense has two components, one subjective, and one objective. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse.[84] In order to satisfy this component, a defendant must adduce evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was consent.
>
> In addition, the defendant must satisfy the objective component, which asks whether the defendant's mistake regarding consent was reasonable under the circumstances. Thus, regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a *Mayberry* instruction. . . .
>
> The defendant bears the burden of raising a reasonable doubt as to whether he harbored a reasonable and good faith but mistaken belief of consent . . . "and then only if the prosecution's proof did not of itself raise such a doubt." (*People v. Babbitt* (1988) 45 Cal. 3d 660, 694. . .)
>
> In *Mayberry*, we held that a requested instruction regarding mistake of fact was required when "some evidence 'deserving of ... consideration'" existed to support that contention. . . . In *People v. Flannel* (1979) 25 Cal. 3d 668, 684–85 . . . and fn. 12, we further explained that a trial court must give a requested instruction only when the defense is supported by "substantial evidence," that is, evidence sufficient to "deserve consideration by the jury," not "whenever *any* evidence is presented, no matter how weak."

---

83. The court notes that Section 26 provides in part: "All persons are capable of committing crimes except those belonging to the following classes: . . . (3) Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent." CAL. PENAL CODE § 26 (2020) (citing People v. Williams, 841 P.2d 961, 975 n.4 (Cal. 1992).

84. Consent for purposes of rape prosecutions is defined as "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved." CAL. PENAL CODE § 261.6 (2020) (citing People v. Williams, 841 P.2d 961, 975 n.6 (Cal. 1992).

> Thus, in determining whether the *Mayberry* instruction should be given, the trial court must examine whether there is substantial evidence that the defendant honestly and reasonably, but mistakenly, believed that the victim consented to sexual intercourse.
>
> Williams asserts that "a successful *Mayberry* defense does not require a jury finding that the defendant's belief was mistaken." However, as the language implies, a mistake of fact occurs when one perceives facts differently from how they actually exist. . . .
>
> Thus, because the *Mayberry* instruction is premised on mistake of fact, the instruction should not be given absent substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not. As one author has explained, under the reasonable mistake defense, "a woman is raped but not by a rapist." (Berliner, *Rethinking the Reasonable Belief Defense to Rape* (1991) 100 YALE L.J. 2687, 2695, fn.56.)[85]

Thus, the defense of mistake of fact must satisfy the evidential onus of a reasonable possibility that the matter exists or does not exist.[86] In *R. v. Barton*,[87] the Supreme Court of Canada pointed out that the availability of the defense of honest but mistaken belief in communicated consent was not unlimited by stating:

> An accused who wishes to rely on the defence of honest but mistaken belief in communicated consent must first demonstrate that there is an air of reality to the defence. This necessarily requires that the trial judge consider whether there is any evidence upon which a reasonable trier of fact acting judicially could find (1) that the accused took reasonable steps to ascertain consent and (2) that the accused honestly believed the complainant communicated consent. This Court recently confirmed that where there is no evidence upon which the trier of fact could find that the accused took reasonable steps to ascertain consent, the defence of honest but mistaken belief in communicated consent must not be left with the jury (see *R. v. Gagnon*, 2018 SCC 41).[88]

85. *People v. Williams*, 841 P.2d 961, 965–66 (Cal. 1992).
86. *See, e.g.*, *Criminal Code 1995* (Cth) s 13.3(6) (Austl.).
87. 2019 SCC 33, [2019] 435 D.L.R. 191 (Can.).
88. *Id.* at ¶ 121.

As Arabian J. observed in the California *People v. Williams* judgment above, the defense of mistake of fact has two components: honest and in good faith (subjective) and reasonable under the circumstances (objective).[89] The inclusion of the word "reasonable" at least avoids the wholly subjective common law test set out in the British court case *Director of Public Prosecutions v. Morgan*[90] whereby the court held that honest belief that the complainant was consenting can be unreasonable.[91] However, the danger remains that the courts will give a liberal interpretation to "evidence of the victim's equivocal conduct," as has occurred in a series of judgments delivered by the Queensland Court of Appeal in Australia, such as: *R. v. Parsons*,[92] *R. v. Mrzljak*,[93] *R. v. Kovacs*,[94] *R. v. Dunrobin*,[95] and *R. v. Phillips*.[96]

For example, in *R. v. Dunrobin*, the complainant's evidence was that she had physically resisted the appellant and consistently told him to stop, although at some point she admitted she had frozen because she was scared.[97] The trial judge directed the jury on mistake of fact under Section 24 of the *Criminal Code 1899* (Qld) in these terms:

> [31] Now, the complainant says that she did not consent. If you accept the complainant's evidence that the defendant touched her breasts and put his fingers and then his penis in her vagina against her wishes, you might think the defendant could not have honestly and reasonably believed the complainant was consenting.[98]

Muir, JA (with whom Fryberg, and Lyons, JJ agreed) held, at [32], that the trial judge's direction to the jury on mistake of fact under Section 24 was deficient in stating acceptance of the complainant's evidence, which meant it was unlikely that the defendant thought the victim was consenting.

> [32] The primary judge says in effect, "if you accept the complainant's evidence that she didn't consent you might think it unlikely that the defendant thought she was consenting." A defence under s 24 of the Criminal Code in a

89. *Williams*, 841 P.2d at 966.

90. [1975] UKHL 3, [1976] AC 182 (HL) (appeal taken from Eng.).

91. *Id.* The decision in *Morgan* has been statutorily overruled by virtue of § 1(1)(c) of the Sexual Offenses Act of 2003 which states: "A person (A) commits an offense if . . . A does not reasonably believe that B consents." Sexual Offenses Act of 2003, c. 42, § 1(1)(c) (UK).

92. *Parsons*, [2001] Qd R 655 (Austl.).

93. *Mrzliak*, [2005] Qd R 308 (Austl.).

94. *Kovacs*, [2007] QCA 143 (Austl.).

95. *Dunrobin*, [2008] QCA 116 (Austl.).

96. *Phillips*, [2009] QCA 57 (Austl.).

97. *Dunrobin*, *supra* note 95.

98. *Id.* ¶ 31.

> matter such as this arises only where there is, in fact, no consent. The mere fact of touching and digital and penile penetration said nothing about the existence of a Section 24 defence. Relevant to that defence was the appellant's state of mind and what was said and done at relevant times which bore on the existence or non-existence of that state of mind.[99]

More importantly, under Section 261 of the California Penal Code, the lack of a fault element implies rape is a strict liability offense, with only mistake of fact available as a defense.[100] From a practical perspective, the classification of the offense of rape as one of strict liability is artificial as the offense requires lack of consent, and a defendant who pleads not guilty is normally pleading that the sexual intercourse was consensual. Furthermore, Section 26 of the California Penal Code is a generic section with no particular reference to rape or the sexual offenses provisions, and contains both a subjective element ("honest") and an objective element ("reasonable").[101] This has required the California Supreme Court to fill in the blanks so to speak in the form of limiting the reach of the defense of mistake of fact to equivocal conduct in *People v. Williams*.[102] Thus, to argue that California Penal Code rape provisions are more victim-centric because they are strict liability offenses combined with a mistake of fact provision that requires the mistaken belief to be honest and reasonable, overlooks the need to define the fault element for rape (such as reckless indifference) and at the same time to specify the limits of mistaken belief in consent where it applies to rape (proceeding regardless of the possibility of lack of consent, failure to take reasonable steps or not giving any thought as to consent).

Arguably, the most high-profile mistake of fact defense to a charge of rape in the United States occurred in 2003 in Colorado, where the defendant was Kobe Bryant, a basketball star with the Los Angeles Lakers.[103] The case never went to trial as the alleged victim refused to testify. However, after the criminal case was dismissed, Bryant released the following statement:

> First, I want to apologize directly to the young woman involved in this incident. I want to apologize to her for my behavior that night and for the consequences she has suffered in the past year. Although this year has been incredibly difficult for me personally, I can only imagine the

99. *Id.* ¶ 32.

100. CAL. PENAL CODE § 261 (2020).

101. CAL. PENAL CODE § 26 (2020).

102. *Williams*, 841 P.2d at 968.

103. Kevin Draper, *Kobe Bryant and the Sexual Assault Case That Was Dropped but Not Forgotten*, NY TIMES (Jan. 27, 2020) https://www.nytimes.com/2020/01/27/sports/basketball/kobe-bryant-rape-case.html [https://perma.cc/7ZH2-U2TB].

> pain she has had to endure. I also want to apologize to her parents and family members, and to my family and friends and supporters, and to the citizens of Eagle, Colorado. I also want to make it clear that I do not question the motives of this young woman. No money has been paid to this woman. She has agreed that this statement will not be used against me in the civil case. Although I truly believe this encounter between us was consensual, I recognize now that she did not and does not view this incident the same way I did. After months of reviewing discovery, listening to her attorney, and even her testimony in person, I now understand how she feels that she did not consent to this encounter. I issue this statement today fully aware that while one part of this case ends today, another remains. I understand that the civil case against me will go forward. That part of this case will be decided by and between the parties directly involved in the incident and will no longer be a financial or emotional drain on the citizens of the state of Colorado.[104]

Speculation as to Bryant's motives for making such a statement range from his accuser's insistence on it being given "as a price of freedom" as claimed by the victim's defense attorney in 2020 to "guilt, some sort of attempt at image rehabilitation, or a genuine sense of trying to achieve some kind of atonement."[105] Leaving aside Bryant's *de facto* admission that his accuser did not believe she was consenting, of more importance is to consider how any trial might have proceeded if Colorado Statute Section 18-3-402 (2020), which deals with rape (sexual assault), contained a fault element of recklessness whose definition included giving no thought as to whether the prosecutrix was consenting.[106]

Colorado Statute Section 18-3-402, unlike Section 261 of the California Penal Code, does contain a fault element, namely, knowledge.[107] Colorado Statute Section 18-3-402 commences as follows: "(1) Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if . . . ."[108] This begs the question: why not also include a broad definition of recklessness such as in Section 47 of the *Criminal Law Consolidation Act 1935* (SA) discussed in Part II?

---

104. Dave Zirin, *Wrestling with Kobe Bryant's Forgotten Apology*, THE NATION (Apr. 19, 2016), https://www.thenation.com/article/society/wrestling-in-with-kobe-bryants-forgotten-apology/.

105. *Id.*

106. COLO. REV. STAT. § 18-3-402 (2020).

107. CAL. PENAL CODE § 261 (2020); *Cf.* COLO. REV. STAT. §18-3-402 (2020).

108. COLO. REV. STAT., *supra* note 106.

C. *Affirmative Consent*

The definition of reckless indifference in Section 47 of the *Criminal Law Consolidation Act 1935* (SA) includes taking reasonable steps to ascertain whether the other person does in fact consent to the act before deciding to proceed.[109] This is known as affirmative consent,[110] and a minority of jurisdictions in the United States have defined consent such as to require words or overt actions to indicate agreement.

> A minority of jurisdictions, including the District of Columbia, Minnesota, New Jersey, Washington, and Wisconsin, require words or overt actions indicating agreement for sexual intercourse or acts to be considered consensual. These jurisdictions define "consent" by statute or case law, generally, as words or overt actions indicating a freely given agreement to have sexual intercourse or contact.[111]

Washington's Revised Code Section 9A.44.010(7) defines consent in these terms: "'Consent' means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact. This definition is open to different interpretations."[112]

A similar provision in New Jersey was considered by the Supreme Court of New Jersey in the case *State in the Interest of M.T.S.*[113] The court in M.T.S. stated:

> Under the reformed statute, permission to engage in sexual penetration must be affirmative and it must be given freely, but that permission may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances. *See Ill. Rev. Stat. ch.* 38, para. 12-17 (1984) (defining consent as "freely given agreement"); *see also, People v. Patterson* 410 *N.W.*2d at 749 (Boyle, J., dissenting) (reasoning that "force" may include "a sexual touching brought about involuntarily," and may consist of "a contact which occurs before consent can be given or refused"); *cf. N.J.S.A.* 2C:2-10(c)(3) (indicating that

109. *Criminal Law Consolidation Act 1935* (SA) s 47(b).

110. See Nicholas J. Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321 (2005), for an article in support of affirmative consent.

111. Tracy et al., *supra* note 58, at 20 (citing in footnote 113 the following: D.C. CODE ANN. § 22-3001(4) (West 2009); MINN. STAT. § 609.341(4)(a) (2019); *State in Interest of M.T.S.*, 129 N.J. 422, 443 (1992); WASH. REV. CODE ANN. § 9A.44.010(7) (West 2020); and WIS. STAT. ANN. § 940.225(4) (West 2018)).

112. WASH. REV. CODE § 9A.44.010(7) (2020).

113. *State in the Interest of M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992).

> "consent" does not constitute a defense sufficient to negate an element of a crime if consent was induced or accomplished by force or coercion). Persons need not, of course, expressly announce their consent to engage in intercourse for there to be affirmative permission. Permission to engage in an act of sexual penetration can be and indeed often is indicated through physical actions rather than words. Permission is demonstrated when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act.[114]

The Supreme Court of New Jersey continued by explaining the role of the fact finder and the matters the State must prove beyond reasonable doubt in a case of sexual assault, asserting:

> . . . The role of the factfinder is to decide not whether engaging in an act of penetration without permission of another person is reasonable, but only whether the defendant's belief that the alleged victim had freely given affirmative permission was reasonable.
>
> In these cases neither the alleged victim's subjective state of mind nor the reasonableness of the alleged victim's actions can be deemed relevant to the offense. The alleged victim may be questioned about what he or she did or said only to determine whether the defendant was reasonable in believing that affirmative permission had been freely given. To repeat, the law places no burden on the alleged victim to have expressed non-consent or to have denied permission, and no inquiry is made into what he or she thought or desired or why he or she did not resist or protest.
>
> In short, in order to convict under the sexual assault statute in cases such as these, the State must prove beyond a reasonable doubt that there was sexual penetration and that it was accomplished without the affirmative and freely-given permission of the alleged victim. As we have indicated, such proof can be based on evidence of conduct or words in light of surrounding circumstances and must demonstrate beyond a reasonable doubt that a reasonable person would not have believed that there was affirmative and freely-given permission. If there is evidence to suggest that the defendant reasonably believed that such permission had been given, the State must demonstrate either that defendant did not actually believe that affirmative permission had been freely-given or

114. *Id.* at 1277.

> that such a belief was unreasonable under all of the circumstances. Thus, the State bears the burden of proof throughout the case.[115]

The final sentence in the above passage has not been universally accepted, not least by the American Bar Association's House of Delegates who on August 12, 2019, "voted 256 - 165 to postpone consideration of a measure urging state legislatures to adopt an 'affirmative consent' standard - a concept often described on campuses as 'yes means yes.'"[116] The opposition's argument was "affirmative consent would improperly shift the burden of proof from the state to the defendant, violating the accused party's civil liberties . . . [t]he defeat provided an important opportunity for the nation's highest-profile legal organization to take a stand for fair treatment of the accused."[117]

With respect, neither the Supreme Court of New Jersey nor the majority of the American Bar Association's House of Delegates are correct regarding the onus of proof and affirmative consent. This is because the introduction of the reasonable steps test replaces the mistake of fact defense, and therefore does not leave the onus of proof unchanged, contrary to the view stated by the Supreme Court of New Jersey in *State of New Jersey in the Interest of M.T.S.*[118] While it is still for the prosecution to disprove the defendant's mistaken belief, there is an onus on the defendant to show he or she took reasonable steps to ascertain whether or not the complainant was consenting to the act. This falls short of placing the onus of proof on the defendant to prove the mistaken belief was honest and reasonable, contrary to the position taken by the majority of the American Bar Association's House of Delegates.[119]

In effect, mistake of fact has been replaced by the reasonable steps test such that the belief in consent has to be more reasonable than honest, by which it is meant the subjective test of "honest" is a secondary factor to the objective test of "reasonable." In this context, the minimum standard of "reasonable" requires the defendant to undertake at least some physical or verbal steps to find out whether the other person is consenting. The defendant can no longer assume consent in his or her own mind.

The revised Model Penal Code sexual assault provisions,[120] which are an affirmative consent formulation, have been summarized by Gruber as follows:

---

115. *Id.* at 1279.

116. K.C. Johnson, *"Affirmative Consent" as a Legal Standard?*, CITY J. (N.Y.), (Aug. 14, 2019), https://www.city-journal.org/affirmative-consent [https://perma.cc/F2QW-7T72].

117. *Id.*

118. *State in the Interest of M.T.S.*, *supra* note 113, at 1279–80.

119. *See* Johnson, *supra* note 116.

120. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (Preliminary Draft No. 5, Sept. 8, 2015).

> [S]ex must occur with consent, which the defendant may determine from all the circumstances, including words, conduct, and overall context . . . . [The] proposal criminalizes sexual penetration without "consent," defined as "a person's freely given agreement to engage in a specific act of sexual penetration or sexual contact, communicated by conduct, words, or both." Importantly, the provision clarifies that "consent may be explicit or it may be inferred from the totality of the circumstances." Thus, in order to find guilt, the jury must find beyond a reasonable doubt that, given the entire picture of the situation, the defendant believed the sex was not consensual.[121]

As Little has pointed out, the purpose of an affirmative consent standard is to grant women the right to determine whether they wish to allow a "*particular* act of sex on that *particular* occasion with that *particular* man."[122] It is difficult to understand how the revised Model Penal Code's affirmative consent formulation is to be attained when (a) the defendant's subjective belief as to consent under all the circumstances is the relevant test; and (b) affirmative consent is not buttressed with a fault element of reckless indifference, which includes (i) giving no thought as to whether or not the other person was consenting and (ii) the taking of reasonable physical or verbal steps to ascertain consent. The better view is to make the relevant test of affirmative consent as objective as possible, which includes dealing with the issue of intoxication.

D. *Affirmative Consent and Intoxication*

Clearly, there are two parties in a rape case, either one of whom or both may be intoxicated at the relevant time.[123] For the alleged victim, consent is vitiated where the circumstances are such that consent could not have been given as the victim was prevented from resisting, as for example in Sections 261(3) and (4) of the California Penal Code.

> (3) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused.
>
> (4) Where a person is at the time unconscious of the nature of the act, and this is known to the accused. As used in this

121. Aya Gruber, *Not Affirmative Consent*, 47 U. PAC. L. REV. 683, 684 (2016).

122. Little, *supra* note 110, at 1363 (citing AILEEN MCCOLGAN, THE CASE FOR TAKING THE DATE OUT OF RAPE 49 (1996)).

123. For the alleged victim, voluntary intoxication can affect consent either by rendering the person incapable of resisting or to give temporal consent which is later regretted. The focus of this Article is on the former. For a full discussion of the latter, see Kevin Cole, *Sex and the Single Malt Girl: How Voluntary Intoxication Affects Consent*, 78 MONT. L. REV. 155 (2017).

> paragraph, "unconscious of the nature of the act" means incapable of resisting because the victim meets any one of the following conditions:
>
> (A) Was unconscious or asleep.
>
> (B) Was not aware, knowing, perceiving, or cognizant that the act occurred.[124]

In both Sections 261(3) and (4) above, the fault element is knowledge in that the condition of the victim was known to the accused. However, to what extent is the subjective component of knowledge (awareness) affected by intoxication for the purpose of sheeting home criminal responsibility to the accused?

It will be recalled from Part III.A above, knowledge is defined under 2.02(2)(b) of the Model Penal Code as:

> 2.02 General Requirements of Culpability.
>
> (2) Kinds of Culpability Defined.
>
> (b) Knowingly.
>
> A person acts knowingly with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
>
> (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.[125]

Intoxication is dealt with under Section 2.08 of the Model Penal Code.

> Section 2.08. Intoxication.
>
> (1) Except as provided in Subsection (4) of this Section, intoxication of the actor is not a defense unless it negatives an element of the offense.
>
> (2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.

124. CAL. PENAL CODE § 261 (2019).

125. MODEL PENAL CODE § 2.02(2) (AM. L. INST. 1985).

> (3) Intoxication does not, in itself, constitute mental disease within the meaning of Section 4.01.
>
> (4) Intoxication that (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law.
>
> Explanatory Note
>
> Subsection (1) declares the basic proposition that intoxication is not as such an excuse for criminal conduct. For the actor's intoxication to have any defensive efficacy it must negative an element of the offense (other than awareness of the risk in recklessness) or, if the intoxication was involuntary or pathological, establish irresponsibility.
>
> Subsection (2) establishes the special rule with respect to awareness of the risk in recklessness, qualifying the general requirement of Section 2.02(2)(c). If the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, his unawareness is declared to be immaterial.[126]

There are two major conclusions to be drawn from Section 2.08 of the Model Penal Code and the Explanatory Note. First, under Section 2.08(1), the intoxication of the actor is not a defense unless it negatives an element of the offense.[127] Secondly, only if the fault element is recklessness, is the actor's unawareness declared to be immaterial.[128] Thus, for example, because knowledge, and not recklessness, is the fault element under Sections 261(3) and (4) of the California Penal Code above, then intoxication does have defensive efficacy to the accused provided he or she was sufficiently intoxicated to be able to negate the knowledge element of the offense of rape where the relevant circumstances come under Sections 261(3) and (4) of the California Penal Code.

However, the situation is different if no fault element is proscribed in the relevant Code or criminal statute legislation, as the default fault element of the Model Penal Code is recklessness. Consequently, if the relevant rape statute does not specify a fault element, then applying

126. MODEL PENAL CODE § 2.08(1)-(4) and explanatory note on §§ (1) and (2) (AM. L. INST. 1984).

127. *Id.* §§ 1.

128. *Id.* §§ 2.

Section 2.02(3) of the Model Penal Code[129] a court would read in the fault element of recklessness. For example, under Section 794.011 of the 2019 Florida Statues, which deals with the crime of sexual battery, there are seven circumstances under which consent is deemed to not be given by the victim.[130] Note in consent circumstance number four, given below, which covers the situation where a victim is intoxicated, that no fault element is prescribed:

> 4. The offender, without the prior knowledge or consent of the victim, administers or has knowledge of someone else administering to the victim any narcotic, anesthetic, or other intoxicating substance that mentally or physically incapacitates the victim.[131]

The court would read into the statute the fault element of recklessness as the default fault element. This then enlivens Section 2.08(2) of the Model Penal Code, resulting in the accused's unawareness being immaterial, and in this regard the accused's criminal responsibility is treated as one of strict liability. Effectively, the interaction between the default mental state of recklessness and voluntary intoxication imputes liability by denying the admission of evidence of intoxication despite the weight it might otherwise have to support an accused's claim to have been subjectively unaware of the risk associated with the accused's conduct.[132]

Unsurprisingly, this state of affairs has caused considerable unrest in criminal law circles over a long period of time. The sponsor of the Model Penal Code, the American Law Institute (ALI), has been working on reforming Article 213 (Sexual Assault and Related Offenses). Erin Price, writing in 2017, has usefully summarized the Model Penal Code's proposed changes as follows:

> The ALI is currently amending the MPC's provisions on Sexual Assault and Related Offenses. In the current proposal, Section 213.0(4) states, "the provisions of Model Penal Code Section 2.08(2) shall not apply to this Article." The "Article" mentioned is Article 213, which is the Sexual

129. *See* MODEL PENAL CODE § 2.02(3) (AM. L. INST. 1985) ("Culpability Required Unless Otherwise Provided. When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto."). As recklessly is the lowest of the three prescribed fault elements on the criminal responsibility ladder, the court would read in the fault element of recklessly.

130. FLA. STAT. § 794.011(4)(e) (2019).

131. *Id.* § (4)(e)(4).

132. Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 36 (1985) ("The Model Penal Code would impute recklessness to the drinker who at the time of his imbibing is unaware of any risk that he may kill or even beat his wife and thus would convict him of reckless homicide.").

> Assault and Related Offenses provision. The proposed draft, in effect, rejects the premise that an offender is automatically reckless because he became voluntarily intoxicated. Instead, it would require that liability for the offenses in Sections 213.1 through 213.8 be proven by evidence of the offender's actual subjective awareness for each material element. If the offender lacks the subjective awareness required for the material element, i.e. due to voluntary intoxication, he cannot be held liable . . . .
>
> While the proposed draft eliminates Section 2.08's application to the Sexual Assault and Related Offenses provisions, it keeps the protection for victims who are "incapable of expressing unwillingness due to intoxication" intact. The draft justifies retaining this safeguard because voluntary intoxication should not be equated with a victim waiving his or her right to "autonomous choice and bodily integrity.". . .
>
> Overall, the draft presents an innovative approach to rape prosecutions by recognizing that a standard that penalizes any sexual activity with an intoxicated individual is inappropriate. If adopted, the proposal permits admitting evidence of both the victim's and the accused's mental state.[133]

A more recent commentary on the ALI's Tentative Draft No. 3,[134] which signals an ongoing, see-saw battle in the ALI between proponents of the subjective and objective approach to affirmative consent, has been put forward by Cole.[135]

> In spring 2016, the ALI fought a floor battle over the core difficulty of affirmative-consent provisions - their reliance on objective definitions of "consent."[136] Rejecting the recommendation of its reporters, the Institute adopted a subjective definition of "consent," focusing on whether the partner was "willing" to engage in the sexual activity in question.[137] Without any change in proposed statutory language, the reporters' draft presented during the spring

133. Erin Price, *The Model Penal Code's New Approach to Rape and Intoxication*, 48 U. PAC. L. REV. 423, 431–33 (2017).

134. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (AM. L. INST., Tentative Draft No. 3, Apr. 6, 2017).

135. Kevin Cole, *Affirmative Consent by Way of the Intoxication "Defense,"* 2017 U. ILL. L. REV. 47, 47 (2017).

136. Braford Richardson, *American Law Institute Considering 'Affirmative Consent' Position on Sexual Assault*, WASH. TIMES (May 17, 2016), http://www.washingtontimes.com/news/2016/May/17/influential-legal-group-considering-affirmative-co/.

137. *Id.*

> 2017 annual meeting signals an approach that would undermine the Institute's preference for a subjective definition of consent. The mechanism is a reversal of the reporters' previous position on the intoxication defense.[138] That reversal would return to the reporters' preferred objective approach to "consent" in the large percentage of cases in which the accused is intoxicated.[139]

Cole continues with a history of the ALI reform project.[140]

> Since the beginning of the ALI project, its reporters have rejected Section 2.08(2).[141] In Preliminary Draft No. 3, Section 213.0(8) states: "'Recklessly' shall carry only the meaning designated in Model Penal Code § 2.02(2)(c). The provisions of Model Penal Code § 2.08(2) shall not apply to this Article."[142]

Cole then reflects on the most recent draft which represents a complete turnaround from rejecting Section 2.08(2) to embracing it.[143]

> By embracing Section 2.08(2), the latest draft requires the same kind of objective inquiry into "consent" that the Institute rejected in spring 2016 in the cases in which the actor is under the influence.[144] In those cases, a factfinder must ascertain whether an actor, unaware of a substantial risk of a partner's unwillingness, "would have been aware had he been sober."[145]

Cole concludes by contending that a rejection of Section 2.08(2) is not really a repudiation of the Model Penal Code's original approach.

> . . . The ALI enacted section 2.08(2) in 1962 in connection with a Model Penal Code that required greater culpability than recklessness for a sexual assault conviction. In the

---

138. *See* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (AM. L. INST., Tentative Draft No. 3, Apr. 6, 2017).

139. *See id.*

140. Cole, *supra* note 135, at 48–49.

141. *See* Kevin Cole, *Better Sex Through Criminal Law: Proxy Crimes, Covert Negligence, and Other Difficulties of "Affirmative Consent" in the ALI's Draft Sexual Assault Provisions*, 53 SAN DIEGO L. REV. 507, 538 (2016).

142. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.0(8) (AM. L. INST., Preliminary Draft No. 3, Oct. 30, 2013).

143. Cole, *supra* note 135, at 51.

144. *See* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.0(4) (AM. L. INST., Tentative Draft No. 3, Apr. 6, 2017).

145. "Unwillingness" is a useful but somewhat misleading shorthand. Consent is defined in terms of "willingness." A person who has given no thought to a sex act is not "willing" to engage in that act; "unwillingness" as used here is not intended to imply that the partner must have thought about and rejected the sex act for consent to be lacking.

> absence of threats or force, the MPC imposed criminal liability for violations of sexual autonomy only when the actor "knows that the contact is offensive to the other person." Since the provision required the actor's knowledge, Section 2.08(2) would not have applied. Making liability turn on recklessness is sensible, but to do so in addition to applying section 2.08(2) is effectively to expand the scope of the intoxication provision.[146]

Section 2.08(2) would not have applied. Making liability

The ongoing battle between the subjective and objective approaches to the interaction of affirmative consent and intoxication is misplaced. The author respectfully agrees with Cole that liability should turn on recklessness (but not recklessness as defined under Section 2.02(2)(c) of the Model Penal Code),[147] and that the additional application of strict liability under Model Penal Code Section 2.08(2) dealing with Intoxication, would be an unwarranted expansion of criminal responsibility.

However, there is a better view which finds expression in Section 36B(1)(a) of the *Crimes Act 1958* (Vic), previously discussed in Part II.C.[148] An objective test is applied in determining whether a person who is intoxicated has a reasonable belief in consent, such that regard must be had to the standard of a reasonable person who is not intoxicated and who is otherwise in the same circumstances as that person at the relevant time. This would prevent a general "because-I-was-drunk" defense while allowing the accused to adduce evidence of his or her own intoxication.

III. MODEL PROVISION FOR THE CRIME OF RAPE IN THE UNITED STATES

There are two underlying foundations to the proposed model provision for the crime of rape in the United States. The first is that the majority of States have adopted some version of the Model Penal Code.[149] The second is that all States have a list of circumstances that vitiate consent. As regards the adoption of the Model Penal Code, it is but a short step to amend the definition of recklessness in Section 2.02(2)(c) in the Model Penal Code for the purpose of including the new definition of reckless indifference in the relevant Part of the Code dealing with sexual assault provisions. As discussed in Part II.D above, the definition of reckless indifference includes taking reasonable steps to ascertain

146. Cole, *supra* note 135, at 53.

147. MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1985).

148. *See supra* note 40.

149. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM L. REV. 319, 320 (2007) ("Promulgated in 1962, the code prompted a wave of state code reforms in the 1960s and 1970s, each influenced by the Model Penal Code.").

consent. This has the advantage of avoiding a debate as to a definition of affirmative consent which appears to have paralyzed the American Law Institute. Instead, "consent" would simply be defined as "free and voluntary agreement."

The inclusion of the provision dealing with taking reasonable steps to ascertain consent also sweeps away the subjective component of the defense of mistake of fact. As mentioned previously, while it is still for the prosecution to disprove the defendant's mistaken belief, there is an onus on the defendant to show he or she took reasonable steps to ascertain whether or not the complainant was consenting to the act. This onus measured against an objective standard of reasonableness under the circumstances does not reverse the onus of proof, but it does not leave the onus of proof unchanged because the subjective component of the defense of mistake of fact has been removed.

Such objectivity is reinforced by measuring the intoxicated accused's reasonable belief in consent against the standard of a reasonable person who is not intoxicated and who is otherwise in the same circumstances as that person at the relevant time.

The purpose of the proposed model provision is on the one hand to avoid a rapist's charter,[150] while on the other hand to prevent the accused from facing a rebuttable presumption of guilt. Essentially, the proposed model rape provision below specifies two alternative fault elements of knowingly, which is taken from Section 2.02(2)(b) in the Model Penal Code,[151] and recklessly indifferent which perforce changes the definition of recklessly given in Section 2.02(2)(c) in the Model Penal Code.[152] The inclusion of taking reasonable steps to ascertain consent also removes the subjective component of Section 2.04(1) Mistake of fact in the Model Penal Code.[153] The author's proposed model rape provision is as follows:

> (1) A person is guilty of rape if the person has sexual intercourse with another person:
>
> (a) without the other person's consent;[154] and
>
> (b) knowing about the lack of consent, or being recklessly indifferent as to the lack of consent, or having no

150. Professor Jennifer Temkin famously referred to the House of Lords decision in *Director of Public Prosecutions v. Morgan* [1975] UKHL 3, [1976] AC 182 (HL) (appeal taken from Eng.) as a "rapist's charter." The House of Lords held that an honest but mistaken belief that the victim was consenting would provide a complete defense; the basis for that belief did not need to be objectively reasonable so long as the jury were satisfied that the defendant honestly believed it. *Id.*

151. MODEL PENAL CODE § 2.02(2)(b) (AM. L. INST. 1984).

152. *Id.* at §2.02(2)(c).

153. *Id.* at § 2.04(1).

154. "Consent" is defined as free and voluntary agreement.

reasonable grounds for believing the other person was consenting.

For the purpose of this sub-section, the following definitions apply:

Knowingly:[155] a person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

Recklessly indifferent: a person is recklessly indifferent to the fact that another person does not consent to an act, or has withdrawn consent to an act, if he or she –

(a) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility; or

(b) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed; or

(c) does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.

(2) For the purpose of sub-section (1)(b), reasonable belief in consent depends on the circumstances known to a person at the time and includes any reasonable physical or verbal steps a person has taken to ascertain whether the other person is consenting.

(3) In determining whether a person who is intoxicated is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, or has a reasonable belief at any time, if the intoxication is self-induced, regard must be had to the standard of a reasonable person who is not intoxicated and who is otherwise in the same circumstances as that person at the relevant time.

155. MODEL PENAL CODE § 2.02(2)(b) (AM. L. INST., Proposed Official Draft 1962).

By contrast with the above proposed model provision for the crime of rape—with its emphasis on the fault element of "recklessly indifferent"—no jurisdiction in the United States specifically prescribes recklessness under Section 2.02(2)(c) in the Model Penal Code as a fault element for rape. Instead, recklessness operates as the default fault element under Section 2.02(3) of the Model Penal Code, provided no other fault element (such as knowledge) is prescribed.[156] A definition of recklessness can be found in Section 794.011(4)(b) of the 2019 Florida Statues as:

> (c) Recklessly.
>
> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.[157]

This begs the question: why do legislators in the United States not specifically avail themselves of recklessness, rather than knowledge, as the fault element for rape, as opposed to relying on recklessness obliquely as the default fault element, when recklessness is both lower on the fault ladder of criminal responsibility and contains an objective component of "a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation?" This is the more surprising as the inclusion of the fault element of knowledge is confined to a small minority of States such as Colorado Statute 18-3-402 (2016).[158]

Instead, the legislative pattern or formula for rape in the United States appears to be as follows:

> 1. The statement that rape is an act of sexual intercourse accomplished with a person under any of the following circumstances which do not constitute free and voluntary agreement, eschewing reference to a fault element and instead relying on the default fault element of recklessness.
>
> 2. The setting out of a list of vitiating circumstances from force and being unconscious to artifice and retaliation. Some of these vitiating circumstances may specify the fault

156. MODEL PENAL CODE § 2.02(3) (AM. L. INST. 1984).

157. FLA. STAT. § 794.011(4)(b) (2019).

158. Tracy et al., *supra* note 58, at 20 (citing D.C. CODE § 22-3001(4) (2012); KAN. STAT. ANN. § 21-5503 (2010); MO. ANN. STAT. § 566.020 (West 2011); TENN. CODE ANN. § 39-13-503 (2011)).

> element of knowledge, such as the unconscious state of the person being known to the accused.
>
> 3. The availability of the defense of mistake of fact provided there is evidence of the victim's equivocal conduct.
>
> 4. The interaction between the default fault element of recklessness and voluntary intoxication imputes liability by denying the admission of evidence of intoxication.

This Article contends that the above legislative pattern or formula for rape in the United States is clumsy, circuitous, piecemeal and lacks clarity.

Turning now to the second foundation of the proposed model provision for the crime of rape in the United States, namely, the list of circumstances that vitiate consent, it is further contended that Section 36(2) of the *Crimes Act 1958* (Vic) discussed in Part II.B,[159] contains a comprehensive list that could usefully be built upon in the United States. Such a list is separate to the actual criminal provision specifying the physical and fault elements of the offense of rape. The essence of the list of circumstances that vitiate consent is comprehensiveness, such that clarity is the hallmark by avoiding general phrases like fraud and deceit.

For example, Section 36(2) of the *Crimes Act 1958* (Vic) discussed in Part II.B could be supplemented with additional Sub-Sections to clarify the circumstances that vitiate consent.[160] These additions have the advantage of being scrutinized and endorsed by the legislature rather than emerging in case law. The author proposes the following list of circumstances that vitiate consent:

> Circumstances in which a person does not consent to an act include, but are not limited to,[161] the following –
>
> (i) the person submits to the act because of intimidating or coercive conduct, or other threat, that does not involve a threat of force;
>
> (ii) the person submits to the act because of the abuse of a position of authority or trust;[162]
>
> (iii) the person gave conditional consent to the act provided the other person wore a condom or withdrew his penis before

159. *See supra* Part II.B.

160. *See supra* Part II.B.

161. The list of vitiating factors is non-exhaustive to allow some degree of judicial discretion where a circumstance not previously considered by the legislature arises in the future. However, it would then be for the legislature to amend the list accordingly provided it supports the case law.

162. *Crimes Act 1900* (NSW) s 61HE(8)(c) (Austl.).

ejaculating and the condition was not met;

(iv) the person agrees or submits to the act because of the fraud or misrepresentation of the accused.

Note

Frauds or misrepresentations, as a vitiating circumstance to consent, are confined to a full comprehension of the nature and purpose of the act and the identity of the person, and specifically exclude a deception involving infidelity, wealth, marital status, intention to marry, and intention to pay a sex worker.[163]

The purpose of the Note above is to prescribe the reach of frauds or misrepresentations and to avoid the potential for criminal responsibility extending beyond community standards which an elected legislature represents.

The United States, like Australia, has a myriad of different circumstances that vitiate consent, many expressed in general terms which leave open the exact reach of criminal responsibility. Criminal Codes are designed to be complete expressions of the criminal law, allowing the citizen to readily comprehend his or her criminal responsibility. This desirable situation cannot occur if the language of the legislation is expressed in open-ended, general terms. Comprehensiveness and clarity are the bedrock of a properly functioning Criminal Code.

CONCLUSION

This Article has contended that the law of rape in the United States needs reform, and that the more progressive jurisdictions in Australia, such as Victoria and South Australia, provide positive examples which the various jurisdictions in the United States could usefully adopt and incorporate.

There is a certain irony in the fact that under the auspices of the American Law Institute, the Model Penal Code 1962 was a pioneering work that provided the basis for the *Criminal Code 1995* (Cth). As discussed in Part II.A, Section 192 of the *Criminal Code 1983* (NT), which deals with sexual intercourse without consent, is written in terms

163. *See* D.P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV., 317, 470–75, 480–87 (2000) (lying about having a venereal disease and failing to disclose a venereal disease were both considered by respondents to be sufficient to vitiate consent).

that reflect the architecture of the *Criminal Code 1995* (Cth).[164] For present purposes, dealing with the specification of fault elements, the relevant Sub-Sections are 192(3) and 192(4A):

> (3) A person is guilty of an offense if the person has sexual intercourse with another person:
>
> (a) without the other person's consent; and
>
> (b) knowing about or being reckless as to the lack of consent.
>
> (4A) For subsection (3) being reckless as to a lack of consent to sexual intercourse includes not giving any thought to whether or not the other person is consenting to the sexual intercourse.[165]

The point being that every jurisdiction in the United States could commence its rape provisions in a similar vein, given that "knowingly" and "recklessly" are defined in the Model Penal Code in Sections 2.02(2)(b) and (c), respectively.[166] The argument has been put that "recklessly" under Section 2.02(2)(c) should be replaced with a wide definition of "recklessly indifferent" for the purpose of rape provisions, but that at a minimum fault elements should be prescribed. Instead, it is common in the United States for the relevant rape provision to be silent on the fault elements, leaving recklessness to operate as the default fault element where Section 2.02(3) (Culpability Required Unless Otherwise Provided) applies.[167]

As has been seen, the operation of recklessness as the default fault element has unfortunate consequences, which have not been addressed, by enlivening Section 2.08(2) of the Model Penal Code, resulting in the intoxicated accused's unawareness being immaterial, and in this regard the accused's criminal responsibility is treated as one of strict liability. Effectively, rape is being treated as a crime of basic intent and the evidence of intoxication is inadmissible.[168]

Then, there is Section 2.04(1) (Mistake of Fact) of the Model Penal Code.[169] Legislatures in the United States have abdicated their responsibility to clarify the interaction between the defense of mistake of fact and consent being defined as free and voluntary agreement to the

164. *See supra* Part II.A.

165. *Criminal Code Act 1983* (NT) s 192(3), (4A) (Austl.).

166. MODEL PENAL CODE §§ 2.02(2)(b)-(c) (AM. L. INST. 1984).

167. MODEL PENAL CODE § 2.02(3) (AM. L. INST. 1984).

168. Basic intent offenses are offenses which require an intention to merely perform an act, such as assault. Specific intent offenses are offenses which require an intention to bring about a particular consequence, such as grievous bodily harm or murder.

169. MODEL PENAL CODE § 2.04(1) (AM. L. INST. 1984).

courts. Case law has imported the test of allowing the defense only where the evidence of consent is "equivocal."[170] Importantly, the so called "consent defense" under Section 2.04(1)(b) provides for a subjective test in the form of "the state of mind established by such . . . mistake" to constitute a defense.[171]

In sum, the law of rape in the United States is unsatisfactory because: (1) fault elements are rarely prescribed; (2) the default fault element of recklessness operates in an *ad hoc* manner with negative implications for the intoxicated accused; (3) the operation of the defense of mistake of fact has been delegated by legislatures to the courts; and (4) the list of circumstances that vitiate consent varies widely.

The proposed solution is to "customize" rape provisions by specifying how the general part of the Code dealing with criminal responsibility is to be modified to suit the challenges of the specific part of the Code dealing with sexual assault offenses. Thus, instead of using the definition of "recklessly" under Section 2.02(2)(c) of the Model Penal Code,[172] a broader definition of "recklessly indifferent" is imported for the relevant Division or Part of the Code covering sexual assault defenses. The specification of a broadly defined fault element avoids the vagaries of deploying the default fault element of recklessness, as well as dealing with the subjective component of mistake of fact under Section 2.04(1)(b) of the Model Penal Code[173] through the mechanism of the reasonable steps test to ascertain consent.

While the reasonable steps provision may not add a great deal to the question of the accused's *mens rea*, it does provide a standard against which to measure the honesty of the accused's asserted belief in consent, as the Supreme Court of Canada appears to have acknowledged in *R. v. Barton*.[174]

The overall purpose of the proposed comprehensive model provision for the crime of rape is to make the process of adjudging criminal responsibility more objective against community standards of when consent has been vitiated.

---

170. See People v. Williams, 841 P.2d 961, 964–66 (Cal. 1992).

171. MODEL PENAL CODE, *supra* note 169, at § 2.04(1)(b).

172. *Id.* at § 2.02(2)(c).

173. MODEL PENAL CODE, *supra* note 169, at §204(1)(b).

174. *See R. v. Barton* 2019 SCC 33, [2019] 435 D.L.R. 191, para. 113 (Can.) ("[A]s a practical matter it is hard to conceive of a situation in which reasonable steps would not also constitute reasonable grounds for the purpose of assessing the honesty of the accused's asserted belief."). The Supreme Court of Canada was considering § 273.2(b) of the Canada Criminal Code which states: "[T]he accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting." Canada Criminal Code, R.S.C. 1985, c C-46.