I would like to thank Pamela Snively for her permission to reproduce her part of the brief.

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29 June 2011

Mistake of Fact

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Mistake of fact as a defence in criminal law has never been codified, and, in theory, need not ever be. A mistake as to a material fact, a constituent element of the offence charged, means that there was no *mens rea* with respect to that offence. There is, however, a compelling reason for codifying a defence of mistake of fact. There is a great deal of confusion in the courts about how to deal with mistakes, particularly when the actions of the accused are blameworthy even under the facts as believed by the accused. This confusion is no more clear than in drug offence cases where mistakes of fact are plentiful and there is a wide spectrum of moral blameworthiness. Certainly the contradictory, highly contrived and at times unprincipled decisions emanating from the courts constitutes a clear signal to Parliament to legislate.[55]

It is imperative that we ensure that the defence of mistake of fact remain consistent and principled. If, according to the facts as believed by the accused at the time of the action in question, the action would have been innocent, then the accused cannot be held to be morally blameworthy for acting as he or she did, and therefore must be acquitted. This principle is simple and is in keeping with the fundamental principles of culpability found throughout our criminal justice system. It is also non-controversial and consistently followed. Where a crime requires either intention, knowledge or recklessness with respect to a particular circumstance, an honest though mistaken belief that that circumstance does not exist necessarily means that a material element of the offence is missing. As indicated in Beaver v. The Queen[56], and clarified in Pappajohn[57], the honesty of the mistaken belief is critical but the reasonableness of that belief is irrelevant unless the crime is one of negligence. Where *mens rea* is measured subjectively, now a fundamental principle of our criminal justice system, the objective reasonableness of a belief seems to have no place in determining moral blameworthiness.

A difficulty arises where, even under the facts as believed by the accused, his or her actions are not innocent. In such a case there is *mens rea*, but not *mens rea* corresponding to the *actus reus* actually carried out. In other words, the accused attempted to commit a crime, but not the crime which actually occurred. If we are to be consistent with our principles of criminal culpability we must recognize that an accused ought not be convicted of a crime for which she or he lacked either the requisite *mens rea* or the requisite *actus reus*. Transferring *mens rea* from one crime to another, which has at times been the practice of the courts, produces anomalous results. Some might argue that a transfer is acceptable when the intended crime is more serious

55 See particularly: R. v. Kundeus (1975), 24 C.C.C. (2d) 276.
56 (1957) 118 C.C.C. 129 (S.C.C.).
57 *Supra*, note 53.

than the actual crime but this type of measurement is not always possible and, where the crimes are distinct in nature, might be manifestly unfair to the accused. There is no clear hierarchy of crimes and each crime carries its own stigma. Furthermore, if we are not to engage in such egregious decisions as Kundeus[58] where the court actually transferred *mens rea* from a less serious crime to a more serious crime, then we will be forced to determine the relative seriousness of each *mens rea* requirement in every situation in order to determine the correct test.

Clearly, it is more principled and more practical to avoid transferring *mens rea* in any case. This leaves us with only one alternative in these situations, and that is to charge the accused with attempting the crime for which the accused had the requisite *mens rea*.[59] At this point the law of attempts would apply in its usual fashion. Of course, where there is an included crime with which the accused is charged and for which he or she had the requisite *mens rea* then a full conviction is in order.

The Canadian Law Reform Commission proposals are consistent with this analysis but do provide an appropriate clarification of the rule. Although it is called an exception by the Commission, the clarification is in fact consistent with the principles underlying the mistake of fact defence. It provides that a mistake shall not provide a defence if it was arrived at negligently or recklessly where negligence or recklessness are sufficient *mens rea* for the crime. Thus we ensure that while protecting the morally innocent we do not likewise protect the morally blameworthy from conviction.

Mistake of Fact and Sexual Assault

The defence of mistake of fact raises a far more controversial issue, one which has disturbed not only the courts but has academics, politicians and the public at large engaged in heated debate. The issue is whether the mistake of fact defence ought to apply in the same manner to sexual assault cases as it does to other crimes. Under the present law an honest though mistaken belief that a woman consented to sexual intercourse will exonerate an accused, even if that belief is entirely unreasonable. This position is clearly articulated by Dickson J. in Pappajohn[60]. Because sexual assault can be committed either intentionally or recklessly (defined as conscious risk-taking) it is clear on principle that an honest belief in consent must exonerate because it cannot exist at the same time as an intention to engage in sexual activity without consent, nor at the same time as a conscious advertence to the possibility of non-consent. Many believe that this defence is too wide and does not provide adequate protection

58 *Supra*, note 55.
59 This approach is consistent with both Laskin C.J.'s dissent in Kundeus (above note 55), and in the Law Reform Commission of Canada's proposals under s.3(2)(a) Report 31 *supra*, note 20.
60 *Supra*, note 53.

for women, while others believe that to restrict the defence would be inconsistent with our fundamental principles of culpability and would allow for the imprisonment of the morally innocent. Why do many academics who fully accept the soundness of the subjective principle of culpability suddenly back off when it comes to this particular issue, and do what appears to be an about-face into the realm of objective standards for culpability? Similarly, why are many of those who wish to retain the honest and unreasonable mistake of fact defence for sexual assault still uncomfortable with the implications for women?

Ultimately, it appears that when we apply our fundamental principles of culpability to sexual assault, something goes awry. This could be because, in fact, we have chosen the wrong *mens rea* requirement for sexual assault and that the proper one should be negligence. If the *mens rea* were negligence then a mistaken belief in consent would have to be reasonable in order to exonerate. There is a strong argument to be made for adopting a negligence standard for sexual assault. It should be noted that a mistaken belief in consent is easily avoided. Unlike a bag of cocaine or sugar of milk, women can talk. Very little effort is required to determine if a woman is consenting, and a very great harm is avoided by doing so. A failure to make that minimal effort can, consequently, be seen as sufficiently morally blameworthy that criminal sanctions are merited.

> The strongest claim of those who would argue that some mistakes must be based on reasonable grounds is that making an unreasonable mistake can sometimes be reckless in the sense of unacceptably careless with respect to the well-being of others... [The] argument is that the making of the mistake is blameworthy to an extent which warrants criminal sanctions; that far from negativing recklessness and therefore liability, the making of such a mistake is itself the culpable behaviour which grounds both.[61]

Despite the fact that adopting a negligence standard for sexual assault would prevent an unreasonable mistake from providing a defence, the solution will not go very far beyond mere symbolism in protecting women's bodily integrity or autonomy. This is, unfortunately, true because sexist views about women's sexuality still predominate. We can do nothing to eliminate "rape myths"[62] which inhibit women's control over consent until we have stopped allowing sexist

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61 Toni Pickard, "Culpable Mistakes and Rape: Harsh Words on Pappajohn" (1980), 30 U.T.L.J. 415 at 418.

62 Rape myths are the sexist beliefs that pervade society about women's sexuality. Examples include the notion that women who say no mean yes but feel obliged to act coy, or want to be overpowered, that women who come back to a man's home at the end of an evening are consenting to sex, that women who hitchhike, who wear short skirts, or who drink heavily in bars are consenting, or deserve to be raped, and that women who engage in sex frequently with different partners have thereby lost their right to say no to any partner. The list is endless and extremely familiar to us all.

beliefs to provide a defence for sexual assault. The law as it exists now is egregious, but even under a regime that allows for only a reasonable mistake to provide a defence there will be a validation and a perpetuation of sexist, and dangerous, views. It essentially disempowers women in that their ability to control consent is taken from them.

> [The] legal concept of mistaken belief in consent defines the boundaries of criminal behaviour without regard to the bodily integrity and sense of self-worth of the victim, or to the liberty and security interests of the victim. It transforms consent from something the woman does into something the man thinks.[63]

A typical response to this observation might be that the criminal law should not be used to combat sexist ideas about women and their sexuality, and that these should be left to develop through education and independent social programs. Many are fearful of compromising fundamental principles of culpability in order to attempt to redress such an evasive problem as sexism. This might be an acceptable view if we were not faced with the reality that the criminal law is not remaining neutral in this process of social development, but is rather sanctioning sexist views.

Merely changing the *mens rea* for sexual assault does not address the central conundrum of mistake of fact as it applies to sexual assault. Why are the fundamental principles failing us on this particular issue? How can we turn the right to control consent over to women and make men respect that right? A more satisfying resolution of this dilemma does seem to come from the position that we have misapplied the mistake of fact defence to the issue of consent in sexual assault.

The essential problem with the mistake of fact defence for sexual assault is that it subordinates legal rights and norms to social norms and beliefs. A woman's legal right to control her body is compromised by cultural beliefs in the form of rape myths. If we were to view the definition of consent as a legal definition, rather than a social one, then a mistake about what constitutes consent, a mistake founded on a rape myth, would constitute a mistake of *law* and not a mistake of *fact*.[64] A mistake of law does not provide a defence to criminal conduct, and that is seen as so fundamental to the rule of law that it is codified in s. 19 of our *Criminal Code*.

The distinction between mistake of fact and mistake of law is at times quite tenuous, but is critical in the outcome of a criminal case. If a mistake is characterized as one of fact, then it can result in an acquittal; if a mistake is characterized as one of law, it provides no defence, although it

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63 Factum of the intervener Women's Legal Education and Action Fund et al. at 21 for Seaboyer v. The Queen (1991), 66 C.C.C.(3d) 321 (S.C.C.).

64 Lucinda Vandervort proposes that this is the proper classification of a mistaken belief in consent defence in her paper "Mistake of Law and Sexual Assault: Consent and Mens Rea" (1987), 2 C.J.W.L. 233.

may factor in sentencing. Despite the fact that the failure to allow a defence of mistake of law might result in a conviction of a morally innocent individual, it is recognized that to do otherwise is to invite anarchy. Legal norms must be uppermost in society, and social norms must yield to them in order that safety for all, consistency and uniform justice be maintained.[65] By not putting the full force of the law behind the issue of consent, we have allowed social norms to rule at the expense of women's safety and freedom.

If we were to recognize that legal definitions must be respected it would not mean that no mistaken belief in consent could ever be a defence to a sexual assault charge. It would merely mean that the law would not allow certain types of mistakes, i.e. those based on rape myths, to provide a defence. The law would be enforcing respect for women's bodily integrity and for their right to say "no". Those mistakes that result from an honest breakdown in communication and a mistake about the facts surrounding an act of sexual intercourse, and not from conclusions drawn about the nature of consent and women's sexuality, would provide a defence of mistake of fact.

An accused would be effectively precluded from pleading mistake of fact where he and the victim disagree about whether there was consent but are actually in agreement about the facts of a case (i.e., they met in a bar; she had been drinking; she was flirting; she agreed to let him walk her home; she agreed to stop at his place for a drink because it was on the way; she engaged in some light sexual activity; she objected and said "no" when he tried to remove her pants; she repeatedly said "no" and tried to move away from him but did not get hysterical or fight back physically.) The accused's conclusion that there was consent because the victim did not fight back must be seen as a mistaken conclusion of law. The law must back up a woman's right to say "no" and have it mean "no" without requiring her to struggle and get hysterical, thereby risking injury or death, before a man is expected to understand that "no" is a lack of consent. It may be that men and women, in effect, speak different languages when it comes to sexual encounters. If the law does not require men to learn to listen to women, then the notion of consent is meaningless and women are left vulnerable and unprotected by the law.

The accused in the above scenario thought he had a legal right to have sex with the accused because of irrelevant actions leading up to the incident, and because she did not fight him off; that is a legal conclusion; he got the facts right but he should be seen to have got the law wrong. If we successfully prosecute cases involving ignorance of the law of consent, there should be fewer and fewer like cases because, gradually, social norms about consent will catch up with legal norms, and rape myths will no longer impact on sexual activity.

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65 It should be noted that there could still be a distinction in sentencing between a crime of sexual assault which was entirely intentional, and one which resulted from ignorance of the law of consent.

Because of our present misclassification of mistaken beliefs about consent as mistakes of fact, rape myths are an integral part of a defence in a sexual assault case; where we do not enforce legal definitions, social definitions fill the void. Failing to see that these mistakes are mistakes about the law of consent, we have tried to correct the injustices which result from our misclassification through other forms of protective legislation. It follows that the fact that we allow a defence of mistaken belief in consent is intimately connected with the presently contentious issue of the "rape shield" laws (s.276 and s.277 of the *Criminal Code*). The rape shield laws were put in place because it was recognized that without them women were going to be subject to sexist and prejudicial cross-examination and that evidence intended to attain an acquittal through the invocation of rape myths would be introduced. Evidently, Parliament recognized that such evidence has no relevant place in a criminal system purporting to protect autonomy.

In the recent Seaboyer decision, however, the Supreme Court of Canada decided that some of the evidence that is restricted by the rape shield laws may be relevant in an accused's defence, and they consequently struck down as invalid these protective provisions because they deprive the accused of s.7 and 11(d) *Charter* rights. The disturbing truth is that the Supreme Court of Canada is right. As the law stands now, and as long as mistaken belief in consent is always characterized as a mistake of fact, these factors are relevant because the focus will remain on the accused's state of mind, on the accused's beliefs about women's sexuality, and not on the reality of consent at all. The result is that sexist, and sometimes violently dangerous views about women's sexuality and men's rights of access to sex are pervasive and therefore relevant; because the law sees such views as relevant they become reinforced and the problem of sexual violence against women is perpetuated.

If the law of consent is clearly established, social myths about what constitutes consent will then have no place in a court of law and many of these other contentious issues will fade into irrelevancy. Happily, a focus on consent is exactly what the proposed new legislation on sexual assault, Bill C-49, emphasizes. The legislation was introduced to fill the void left when the rape shield provisions were struck down, but it goes farther than that. It more clearly defines the meaning of consent (or more precisely, what is not consent) than has previously been done. What will probably prove to be the most controversial aspect of the legislation is the fact that it appears to place a positive duty on a man (or any sexual actor) to "take all reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting." This approach is consistent with a sexual assault law that focuses on a woman's power of consent. It does not purport to judge the reasonableness of the man's belief, but rather the amount of respect he showed for her right to give or withhold consent. It necessarily forces men to focus on that aspect of consent and to recognize that, as the law stands, sexual touching

is assault unless the person touched consents to that touching; the law does not say that the action is not assault unless the person being touched objects or struggles.

By providing, in proposed s.273.1, a list of circumstances under which consent is deemed not to be obtained, the new legislation is attempting to create a more concrete body of law that can be seen as the law of consent. S.273.1(2)(d) makes it clear that no consent is obtained where "the complainant expresses, by words or conduct, a lack of agreement to engage in the activity". This would mean that in the hypothetical transaction that was outlined earlier, where the woman said "no" but neither fought nor became hysterical, there is clearly, legally speaking, a lack of consent. It should not be difficult to see that, under this legislation, the accused should be precluded from claiming that when he believed that something set out in law as specifically *not* constituting consent *was* consent, his mistake was one of *fact*. This legislation makes it even easier for us to recognize such a mistake as one based on ignorance of the law of consent.

It was outlined at the beginning of this paper that it is necessary to codify the defence of mistake of fact because it has proved to be a problematic and confusing area of law for the courts. The same reasoning applies when dealing with the distinction between mistake of fact and mistake of law as it relates to sexual assault. It would be irresponsible to leave the issue unclear. As it is not set out clearly in the sexual assault legislation which exists now or in that which is proposed, it would be wise to include it in the new provisions for mistake of fact. The proposed new provision would then read just as the Law Reform Commission of Canada proposals but with an addendum reading as follows:

> (c) With respect to sexual assault, a mistaken belief in consent that is brought about by a mistaken belief about what constitutes consent is a mistake of law and not a mistake of fact.[66]

The mistake of fact defence is sound in principle and certainly has a place in our criminal justice system, however, it can and has been improperly applied. The accused in the Beaver case made a factual mistake when he mistook diacetylmorphine for sugar of milk. The accused in Morgan[67] made a mistake as to the law of consent when he determined that one person can give consent on behalf of someone else. The distinction is all important, and, when properly made, results in a law of sexual assault that is infinitely more just. Perhaps even more importantly, when the distinction is clear and the fundamental principles of culpability are consistently applied, yielding consistently just results, respect for the entire criminal justice system is enhanced.

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66 See below where the proposals put forward in this paper are set out in full.

67 Director of Public Prosecutions v. Morgan [1975], 2 All E.R. 347

The Proposals put forward by this paper :

MISTAKE OF FACT:

(a) No one is liable for a crime committed through lack of knowledge which is due to mistake or ignorance as to the relevant circumstances; but where on the facts as he believed them he would have committed an included crime or a different crime from that charged, he shall be liable for committing that included crime or attempting that different crime.

(b) Exception: Recklessness and Negligence. This clause shall not apply as a defence to crimes that can be committed by recklessness or negligence where the lack of knowledge is due to the defendant's recklessness or negligence as the case may be.[68]

(c) With respect to sexual assault, a mistaken belief in consent that is brought about by a mistaken belief about what constitutes consent is a mistake of law and not a mistake of fact.

68 Please note that (a) and (b) are word for word the recommendations of the Canadian Law Reform Commission proposals.