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Note

RECENT PROPOSALS IN THE CRIMINAL LAW OF RAPE: SIGNIFICANT REFORM OR SEMANTIC CHANGE?

By THOMAS J. LEWIS*

I. INTRODUCTION

Until the latter part of the 1960's, the primary concern with the law of rape was its adequacy for protecting men from unfounded and malicious charges. However, in the last decade the law of rape and the accompanying judicial and police procedures have been criticized severely because of the way in which they contribute to an odious and humiliating treatment of women. This criticism does not come only from a radical element within the women's liberation movement. It is characteristic of a broad spectrum of popular writing and scholarly research,¹ and has recently found support among those who work within the criminal justice system in Canada, as well as in Britain, Australia and the United States. This has resulted in a major re-examination of the parts of the criminal law dealing with sexual offences, and in numerous proposals for change.

A widely accepted basis for statutory reform is a reduction in the emphasis on the sexual nature of rape and related offences, and an increased emphasis on the element of violence. Rape would be treated explicitly as a subset of assault and not as an illegal sexual act. This is the position adopted in a recent Canadian report on sexual offences,² as well as in the proposed amendments to the *Criminal Code* contained in Bill C-52.³

The most objectionable consequences for the woman complainant in a rape case are caused by the criminal justice system in those instances in which it is expected that the question of her consent will arise, or when the issue of consent actually is raised by the defendant. Unfortunately, it is not clear that this problem can be resolved effectively by replacing the offence

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¹ This shift of focus in scholarly writing is emphasized by Chappell, Geis and Fogarty in their overview of the relevant literature. See the introduction to their *Forcible Rape: Bibliography* (1974), 65 *J. Crim. L. & Criminology* 248.

² Can., *Sexual Offences, Working Paper 22* (Ottawa: Minister of Supply and Services, 1978).

³ *Criminal Law Amendment Act, 1977, S.C. 1976-77, c. 53.*

of rape with some form of assault. This strategy has been examined in Britain, but it was not employed in the recent amendments to the British legislation concerning sexual offences.⁴

It is the thesis of this note that, in light of the prevailing concepts of criminal liability and the resulting role of the consent standard, the proposed emphasis on violence cannot be expected to alleviate the difficulties arising from the existing law. It is submitted that, in fact, this emphasis presently serves to obscure the essential elements of the law that must be addressed.

In order to support this contention, it may be helpful to begin by reviewing briefly the proposals of the report on sexual offences and the subsequent provisions of Bill C-52. This will be followed by an examination of the place of consent in existing Canadian law, and the difficulties that consent poses for the proposed reforms. Central to these difficulties is the highly subjective element of *mens rea* in criminal liability, and, to clarify this aspect of consent, the recent British experience will be examined in some detail.

II. REFORM PROPOSALS

One of the more recent studies to focus on the problem of redefining rape is the report on sexual offences by the Law Reform Commission of Canada, which draws attention to two ways of conceptualizing rape. The first is to consider those sexual activities designated as offences as a subset of a broader category of sexual activity.⁵ This approach is presently reflected in Part IV of the *Criminal Code*, entitled "Sexual Offences, Public Morals, and Disorderly Conduct."⁶ Rape is treated as sexual intercourse that occurs in the absence of valid consent, and is, accordingly, prohibited. The Working Paper proposes that the offence of rape should be reconceptualized as a violation of the integrity of the person, and treated as a form of assault.

An assault is essentially an intentional application of force on another, or an attempt or threat to apply force without that person's consent. Rape is the intentional application of force in order to accomplish sexual intercourse without the victim's consent. On this basis, it can be seen that all of the legally defined elements of rape are contained in the concept of assault, with sexual intercourse being a specific ingredient in addition to the force applied or threatened by the accused.⁷

The report suggests that to conceptualize rape in this way places primary focus "on the assault or the violation of the integrity of the person rather than the sexual intercourse."⁸

The Working Paper does note that even though rape is a species of assault, it is set apart from assault in at least two very important ways. It is the only kind of assault that can impregnate a woman. Furthermore, it lacks the essential and highly valued feature of consent that is present in an act of

⁴ *The Sexual Offences (Amendment) Act, 1976*, c. 82 (U.K.).

⁵ *Working Paper 22*, *supra* note 2, at 19-24.

⁶ R.S.C. 1970, c. C-34.

⁷ *Working Paper 22*, *supra* note 2, at 15-16.

⁸ *Id.* at 16.

consensual sexual intercourse. Although assault is the application of force without consent, the question of consent is seldom at issue in other types of assault.⁹ Despite these special features, the Working Paper concludes that rape should be subsumed under a more general offence of sexual assault. Accordingly, the report recommends that the existing *Criminal Code* be amended to replace the offence of rape with the offence of sexual assault as follows:

- (1) Every one who has sexual contact with a person without that person's consent is guilty of an offence of sexual assault.
- (2) For the purposes of this section "sexual contact" includes any touching of the sexual organs of another or the touching of another with one's sexual organs that is not accidental and that is offensive to the sexual dignity of that person.
- (3) In determining the sentence of a person convicted under this section the judge shall consider all of the circumstances and consequences of the offence including whether there has been penetration or violence.¹⁰

This reformulation is said to avoid the problems that would be created by simply relabelling rape as assault, because it does not draw a distinction "between unwanted sexual contact and unwanted sexual penetration for the purposes of substantive law, but rather provides for consideration of aggravating circumstances of the assault when the sentence is determined."¹¹ The law would then be consistent with the principle of the right of every person to be free from physical assault.

The report suggests that there is some doubt as to whether this reformulation "would be more effective in terms of increased protection for the dignity and inviolability of the person, or whether its greatest value would lie in alleviating the distress, humiliation and stigmatization that is associated with the present law. . . ."¹² Unfortunately, the relevant question may not be one of determining which of these purposes will be better served but, rather, whether the reformulation will foster the attainment of either goal to any degree whatsoever.

The concerns of the Law Reform Commission are reflected in the proposed changes to the *Criminal Code* in Bill C-52, which was given first reading on May 1, 1978. If enacted, these amendments would replace the offence of rape with the offences of indecent assault and aggravated indecent assault. These basic changes would require a repeal of sections 143, 144, 145 and 149 of the existing Code, which specify the separate offences of rape and indecent assault, and the replacement of these sections with a new section containing a broadened definition of indecent assault, so as to include the present offence of rape. The proposed amendment reads as follows:

149. (1) Every one who indecently assaults another person is guilty of an indictable offence and is liable to imprisonment for fourteen years.
(2) An accused who is charged with an offence under subsection (1) or section 149.1 may be convicted if the evidence establishes that the accused did anything to the other person with his or her consent that, but for such

⁹ *Id.* at 20.

¹⁰ *Id.* at 22.

¹¹ *Id.* at 21.

¹² *Id.* at 18.

consent, would have been an indecent assault or an aggravated indecent assault, if such consent was obtained by personating the spouse of the other person or by false and fraudulent representations as to the nature and quality of the act, or was extorted by threats or fear of bodily harm.

- 149.1 Every one who indecently assaults another person is, where the indecent assault results in severe physical or psychological damage to that other person, guilty of an indictable offence and liable to imprisonment for life.
- 149.2 For the purposes of sections 149 and 149.1 and without restricting the generality of the term "indecent assault", an indecent assault includes sexual penetration of any bodily orifice.
- 149.3 No prosecution shall be instituted under section 149 or 149.1 in respect of an offence alleged to have been committed by a person against his or her spouse unless the spouse were living separate and apart at the material time.

According to the then Minister of Justice, the Honourable Ron Basford, the purpose of these amendments is to emphasize the violent nature of rape, in order to minimize the trauma experienced and the stigma that often attaches to rape victims, and to prevent the victim from virtually being placed on trial herself.¹³ The basic question is whether these amendments would grapple substantially with the problems that arise from the existing law of rape. However, any answer to that question presupposes an accurate understanding of the present law of rape and particularly of the pivotal role of the "consent standard."¹⁴ Much of the criticism of the existing law arises from the use of the consent standard, and the changes proposed in Bill C-52 are designed to alleviate precisely these difficulties. If the provisions of Bill C-52 are to improve the situation of women who allege rape, and thereby be a more effective deterrent to rape, the changes in the law must be substantive rather than merely semantic. Unfortunately, there is reason to doubt that this is the case.

At present, section 143 of the *Criminal Code* defines rape as follows:

A male person commits rape when he has sexual intercourse with a female person who is not his wife,

- (a) without her consent, or
- (b) with her consent if the consent
 - (i) is extorted by threats or fear of bodily harm,
 - (ii) is obtained by personating her husband, or
 - (iii) is obtained by false and fraudulent representations as to the nature and quality of the act.¹⁵

Consent is the crux of the matter.

Ostensibly, the proposed amendments to the Code could constitute a major change in the law in Canada by reducing the role of consent substantially. However, in order to be able to separate substance from semantics, it is necessary to explore the more general offence of "assault" in the *Criminal*

¹³ For accounts of the news conference held by the Minister of Justice, see *The Globe and Mail*, May 2, 1978 at 1, and the *Toronto Star*, May 2, 1978 at 1.

¹⁴ Part IV, section D of Chappell, Geis and Fogarty, *supra* note 1, lists much of the relevant work on the consent standard prior to 1972. Also see Scutt, *The Standard of Consent in Rape*, [1976] N.Z.L.J. 462, and her closely related article, *A Disturbing Case of Consent in Rape* (1976), 40 J. Crim. L. 206, 271.

¹⁵ R.S.C. 1970, c. C-34.

Code. Indecent assault (however it is defined) is a subset of the more general category of "assault," which is found in section 244 of the *Criminal Code*:

A person commits an assault when

- (a) without the consent of another person or with consent, where it is obtained by fraud, he applies force intentionally to the person of the other, directly or indirectly;
- (b) he attempts or threatens, by an act or gesture, to apply force to the person of the other, if he has or causes the other to believe upon reasonable grounds that he has present ability to effect his purpose; or
- (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person and begs.¹⁶

It is not, however, made explicit in the statements of what the Bill is expected to accomplish that assault is the direct or indirect use of force *without consent*. To obtain a conviction for either indecent assault or aggravated indecent assault, the prosecution would have to be able to establish as a fact that the complainant did not consent, or that consent was obtained by fraud. In instances of severe physical damage to the complainant this would not be difficult to establish—but it is not difficult under the law of rape as it presently exists. It is in the absence of signs of force, which are inconsistent with consent, that the present law permits the defence to cross-examine the woman in what is often a deplorable and extremely humiliating manner. However, because lack of consent is also essential in establishing that the accused is guilty of assault, it is difficult to see how the proposed amendments to the *Criminal Code* can be expected to alter in substance the nature of the trial process, whether the charge be rape or some form of assault.

The essential element of rape is intercourse without consent, while the essential element of assault is violence or force without consent. The change of wording from "rape" to "assault" avoids neither the issue of consent nor the problems to which it gives rise. To begin to appreciate the virtually intractable nature of these problems, more needs to be said both about the controlling concept of liability, and about the basic rights that underlie the consent standard.

III. THE NATURE OF CONSENT

The redefinition of rape as assault cannot amount to a substantive change because it does not avoid the problem of sorting out the interconnected decisions arising from the principle of the equal right of choice, which provides the basis for so much demeaning cross-examination. To be clear about why this is so, it may help to look at part of the argument of Clark and Lewis, who advocate the redefinition of rape as assault. They draw an extended comparison between sexual intercourse and exchanges of money.

Sexual intercourse is the only form of social transaction which is not automatically redefined by the presence of physical coercion. All exchanges of money between one person and another are monetary in nature, but an exchange of money to which the owner freely consents is referred to as a "gift", whereas an exchange of money which the recipient effects through physical coercion is referred to as a

¹⁶ R.S.C. 1970, c. C-34, as am. by R.S.C. 1974-75-76, c. 93, s. 21. This section of the Code is not altered by Bill C-52.

"theft". And it is assumed that where the recipient used or threatened physical force, the donor did not consent to the act in question. Gifts and thefts are both monetary transactions, but it is the differences, rather than the similarities, between them which are thought to be important—important enough to be marked by a verbal distinction.

In the case of monetary exchanges, the mere presence of physical coercion negates any presumption of consent on the part of the giver and hence makes the issue of consent *prima facie* irrelevant. Why is this not also the rule with physically coerced acts of sexual intercourse? Only in the case of sexual transactions do we refuse to acknowledge that the relevant issue is the offender's behaviour rather than the victim's state of mind. In rape, as in theft, the use or threat of physical force ought to negate any presumption of consent on the victim's part.¹⁷

They conclude that "the same standards which apply to other acts characterized by the threat or reality of physical coercion should also apply to acts of sexual intercourse"¹⁸ and, thus, that rape should be viewed as essentially assaultive in nature.

There are two basic problems with this comparison between monetary and sexual transactions. First, exchanges of money within our society, in all but the most nominal sums, are made either in public places, or in a manner that can be verified publicly. If disputes arise, the essentially public nature of these transactions makes it possible to ascertain rather easily whether they arose from the consent of the parties involved. Secret or non-verifiable monetary transactions are not the norm, and their very existence gives rise to suspicions that they stem from conditions incompatible with consent, such as fraud, blackmail, extortion, or threat of physical violence. In contrast, sexual transactions such as intercourse are generally private; indeed, they cannot legally be public. Thus, in the absence of evidence of physical violence, if a woman claims that intercourse occurred without her consent, and this claim is seriously contested, there is a difficulty of quite a different magnitude than for most contested monetary transactions in establishing the actual nature of the decisions of the complainant and the accused or the nature of the decision as it appeared, as distinct from what it might really have been.

The second problematic element is the instrumental nature of most monetary transactions. Most monetary transactions are not gifts, but transfers of money for a commodity or definite service. Thus, whether public or private, an initial assessment of the voluntary nature of the transaction can be made in terms of the appropriateness of the *quid pro quo*. For example, if a householder were to pay \$10,000 for aluminum siding that could be purchased elsewhere for \$2,000, there would be grounds for suspecting that the transaction resulted from behaviour that was not entirely free from misrepresentation or even intimidation. Upon investigation these suspicions may not be substantiated, but the instrumental nature of the transaction does provide a *quid pro quo*, the adequacy of which can serve as an indicator of circumstances inconsistent with consent. Sexual transactions, however, are not fundamentally instrumental. Consensual sexual relations may be considered a transaction, but a transaction of this nature is not normally a means of ac-

¹⁷ Clark and Lewis, *Rape: the price of coercive sexuality* (Toronto: The Women's Press, 1977) at 163-64.

¹⁸ *Id.* at 165.

quiring some specific commodity or service. Because this is so, it is not possible to assess the adequacy of a *quid pro quo* to form a preliminary judgment about the consensual nature of the transaction.

These two differences between monetary and sexual transactions are both relevant to establishing a presumption of credibility in monetary disputes. Thus, if there is no formal public record of a monetary transaction or evidence that the alleged transaction did not result in the exchange of a relatively normal commodity or service, then there is *prima facie* evidence for suspecting some form of coercion. If fraud or theft was to be alleged by the person who had paid out the money, and if he could establish that he had in fact paid out the sum of money, the unusual circumstances would provide a basis for his credibility. In this context, any independent evidence of intimidation would be very persuasive. In the absence of evidence of violence, the generally private and non-instrumental nature of sexual transactions largely removes the possibility of the complainant's enjoying an initial presumption of credibility if the accused admits intercourse but claims consent. Because what has occurred does not on the surface deviate from normal, or at least legal, sexual decisions, the balance of credibility is appropriately much more even, with no presumption in favour of the complainant or the accused. This would not be the case if there were evidence of violence. It is in instances in which there is no evidence of violence, however, that the truly difficult problems arise. A clear line must also be drawn between the threat of violence and evidence of actual violence, for allegations of threats made in private, if denied by the accused, cannot be taken as evidence of assault independent of an assessment of the credibility of both parties.¹⁹

There are basically two ways in which the law might respond to the inherent problem of consent in sexual offences: it might focus on an *objective* interpretation of whether consent was present, or, alternatively, seek to determine whether consent was present in a *subjective* sense.

An established basis for a defence to the charge of rape is the claim that the accused believed that the complainant consented to intercourse. If this claim is to be assessed at the objective level, the issue to be decided is not whether the accused held the belief (albeit mistakenly), but whether the belief was held reasonably. This objective character of *mens rea* has a solid basis in common law and is applicable in most jurisdictions in the United States.²⁰ However, as statutory definitions of rape are revised, and greater emphasis is placed on the conduct of the accused, the precise nature of his intentions is opened to greater scrutiny. This is reflected in the treatment of *mens rea* in the *Model Penal Code*,²¹ which defines four levels of criminal

¹⁹ Most cases of alleged rape that are reported to the police do not involve any direct form of violence. As a result, this type of evidentiary difficulty is a frequent problem. Of all complaints of rape in Toronto in 1970, only thirty-two percent of the complainants alleged that they suffered physical violence of any kind and only thirty-seven percent claimed that they had been threatened verbally with violence. *Id.* at 67-68.

²⁰ *U.S. v. Short*, 4 U.S.C.M.A. 437, 16 C.M.R. 11 (1954); *State v. Dizon*, 390 P. 2d 759, 47 Hawaii 444 (S.Ct. 1964).

²¹ American Law Institute, *Model Penal Code: Proposed Official Draft* (Philadelphia: A.L.I., 1962) at 24, Article 2.

intention: purpose, knowledge, recklessness, and criminal negligence, and assigns each level of intention to different crimes or different elements within each crime.²² As applied to rape, an adequate defence would be a mistaken belief that the complainant has consented, if this mistake of fact was not made recklessly.²³ Despite the substantial impact of the *Model Penal Code* on the re-drafting of rape statutes throughout the United States, reasonableness still is generally required if a mistaken belief in consent is claimed.²⁴

In England, the decision in *R. v. Morgan*²⁵ rejected the requirement of reasonable belief, and established that in the case of rape the question of consent must be assessed in a subjective manner. The *Morgan* decision caused a public outcry, which in turn precipitated amendments clarifying the law of rape. To see why the *Morgan* decision should have caused so much concern about the consequences of the consent standard for women, it is necessary to have some acquaintance with the facts of the case, and with the nature of the judicial reasoning based on these facts.

Morgan, a married man, had spent the evening drinking with three younger male friends, all of whom were strangers to his wife. He invited all three to his house to have intercourse with his wife, telling them that she would not object, and that if she seemed to object, and even if she struggled somewhat, it was only because this excited her. The three men accompanied Morgan to his home, woke Mrs. Morgan and wrestled her into an adjoining room, while (according to Mrs. Morgan) she struggled and screamed to her sons to call for help. She was held on a bed while a number of sexual acts were performed, and each of the three men had intercourse with her. When they left, her husband forced her to have intercourse with him. Immediately thereafter she ran out of the house, drove to a hospital and made a complaint of rape. Both the medical evidence and the subsequent statements of the accused to the police substantially corroborated the details provided by Mrs. Morgan. However, at the trial the defendants repudiated most of their previous statements to the police, and, although they admitted their actions, they claimed that once in the adjoining bedroom she had consented to intercourse and, indeed, had been a willing and active participant. The defence of the three younger men was that, despite the unusual circumstances, she had consented to intercourse, and, even if she had not consented, they believed that she had consented. In either event, they could not be guilty of rape.

As part of his summing-up, the trial judge instructed the jury that:

[T]he prosecution have to prove that each defendant intended to have sexual intercourse with this woman without her consent. Not merely that he intended to have intercourse with her but that he intended to have intercourse without her consent. Therefore if the defendant believed or may have believed that Mrs. Morgan consented to him [sic] having sexual intercourse with her, then there would be no

²² *Id.* at 25-26, §2.02.

²³ The level of intention required is not prescribed in the definition of rape so that the general provision that recklessness is sufficient to establish culpability is applicable. *Id.* at 142-43, Article 213, §213.1 and at 26-27, Article 2, §2.02(3).

²⁴ See Note, *Recent Statutory Developments in the Definition of Forcible Rape* (1975), 61 Va. L. Rev. 1500 at 1533-36.

²⁵ *R. v. Morgan*, [1976] A.C. 192, [1975] 2 All E.R. 347, 61 Cr. App. R. 123 (H.L.). For the Court of Appeal decision, see [1976] A.C. 182, [1975] 1 All E.R. 8.

such intent in his mind and he would be not guilty of the offence of rape, but such a belief must be honestly held by the defendant in the first place. He must really believe that. And, secondly, his belief must be a reasonable belief; such a belief as a reasonable man would entertain if he applied his mind and thought about the matter. It is not enough for a defendant to rely upon a belief, even though he honestly held it, if it was completely fanciful; contrary to every indication which could be given which would carry some weight with a reasonable man.²⁶

The jury rejected the defence position. The three friends were convicted of rape and Morgan was convicted of aiding and abetting.

The defendants appealed their convictions on the basis that the trial judge had made a mistake in law in his direction to the jury when he held that their belief in consent must be reasonable. They contended that an honest belief in consent was incompatible with an intent to commit rape, whether or not the belief was based on reasonable grounds. The Court of Appeal agreed with the direction of the trial judge and rejected the appeals, although it did reduce the sentences in each case. The Court of Appeal also gave the appellants permission to appeal to the House of Lords on the grounds that a point of law of general public importance was involved, that is, "whether in rape the defendant can properly be convicted notwithstanding that he in fact believed that the woman consented if such belief was not based on reasonable grounds."²⁷

By majority decision, the Law Lords held that "a man ought not to be convicted of rape unless the prosecution proved that he intended to do what the law forbids, i.e., have intercourse with a woman without her consent—or being reckless as to whether she consented or not."²⁸ As explained by Lord Hailsham, recklessness was to be understood as the accused's intending to have intercourse "not caring whether the victim be a consenting party or not, [for] that was equivalent on ordinary principles to an intent to do the prohibited act without the victim's consent."²⁹ From this it was held to follow that, if a *genuine*, albeit mistaken, belief on the part of the accused that the woman had consented could be demonstrated, the accused could not be guilty of rape. As to the reasonableness of the defendant's belief that the woman had consented, strictly speaking his belief need not be reasonable but simply genuine. Reasonableness was by no means irrelevant; indeed, the Law Lords emphasized that "the more reasonable were the grounds put forward for this belief, the more likely would a jury be to accept its genuineness. . . ."³⁰ This notwithstanding, the nub of the question is still the genuineness of the belief. A conviction could not properly be obtained if the jury were to view the defendant as having genuinely, but unreasonably, believed that the woman had consented.

Although the Lords agreed with the appellants on the point of law and concluded that the jury had been misdirected, the convictions were allowed

²⁶ As quoted by the Court of Appeal at 187 (A.C.), 11 (All E.R.).

²⁷ *Id.* at 192 (A.C.), 15 (All E.R.).

²⁸ *Report of the Advisory Group on the Law of Rape (Heilbron Report)* (Cmnd. 6352, 1975) at 6.

²⁹ *Id.* at 7.

³⁰ *Id.*

to stand. The Law Lords concluded that despite the misdirection there had not been a miscarriage of justice because, if properly instructed (as it admittedly had not been), the jury still would have convicted. Despite this outcome, a public outcry occurred because of the importance attributed by the Law Lords to what the accused actually believed about the woman's consent as distinct from what it was reasonable to believe. Some of the press depicted the ruling as a "rapists' charter," and two private member's bills were submitted in the House of Commons to change the existing law.³¹

So great was the outcry that the Home Secretary found it necessary to appoint the Advisory Group on the Law of Rape, chaired by the Honourable Mme Justice Heilbron. The *Heilbron Report* (officially styled the *Report of the Advisory Group on the Law of Rape*) was presented to the British Parliament in December of 1975.

The *Heilbron Report* recommended a number of changes in the conduct of rape trials. These proposed changes included a provision for the guarantee of anonymity for those who allege rape (except in special circumstances), and the recommendation that "[t]he previous sexual history of the complainant with men other than the accused should be inadmissible, except with the leave of the trial Judge on application made to him in the absence of the jury."³² On the specific point of law at issue in the *Morgan* case, the *Heilbron Report* supported the ruling of the Law Lords. It did recommend that a statutory definition of rape should be provided to clarify (but not change) the existing law, and that this statutory definition should be framed to emphasize the importance of recklessness as a mental element in the crime of rape.³³ It also recommended that the definition should emphasize that lack of consent, not violence, is the crux of the matter, and that, in cases where the question of belief is raised, the statute should declare that:

[T]he issue which the jury have to consider is whether the accused at the time when sexual intercourse took place believed that she was consenting, and make it clear that, while there is no requirement of law that such a belief must be based on reasonable grounds, the presence or absence of such grounds is a relevant consideration to which the jury should have regard, in conjunction with all other evidence, in considering whether the accused genuinely had such a belief.³⁴

The *Heilbron Report* was well received by legal commentators as being an accurate rendering of the law of rape as it currently stood in Britain, and for suggesting modifications that would, on the whole, constitute improvements in the legal process, especially as it affects women.³⁵

The amendments to the *Sexual Offences Act* followed the *Heilbron Report* recommendations very closely, particularly in the matter of the major point of law raised by the *Morgan* case. Thus, the law of rape as interpreted by the Law Lords remains unaltered but clarified:

[A] man commits rape if—

(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and

³¹ *Id.* at 41.

³² *Id.* at 23-24; also see *id.* at 36.

³³ *Id.* at 14.

³⁴ *Id.*

³⁵ Smith, *The Heilbron Report*, [1976] *Crim. L. Rev.* 97.

(b) at the time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it; . . .³⁶

With respect to the claim that the defendant believed that the woman had consented, the amended Act specifies that:

[I]f at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.³⁷

As was made clear in the amendments, consent is the critical issue in defining rape, and "reasonableness" of belief that the woman consented is only one factor among others that must be considered in assessing whether the defendant genuinely did believe that the woman had consented. The amendments clearly presume heavy reliance on subjective liability; that is, conviction is justified only if the jury is convinced that (a) the woman did not consent and (b) this was understood by the defendant, or he proceeded so recklessly as to disregard whether she consented. Only if these conditions are met can it be concluded that the defendant chose to do what the law forbids.³⁸

English and Canadian reliance on subjective liability is by no means unique to this area of criminal law, but the way in which the complainant herself frequently seems to be on trial in rape cases is due to a kind of compounding of subjectivity. This is so because of the necessity of distinguishing the criminal act of rape from lawful sexual intercourse. As the *Heilbron Report* states:

[The crime of rape] involves an act—sexual intercourse—which is not in itself either criminal or unlawful, and can, indeed, be both desirable and pleasurable. Whether it is criminal depends on complex considerations, since the mental states of both parties and the influence of each upon the other as well as their physical interaction have to be considered and are sometimes difficult to interpret—all the more so since normally the act takes place in private There may well be circumstances where each party interprets the situation differently, and it may be quite impossible to determine with any confidence which interpretation is right.³⁹

To distinguish rape from intercourse requires a sorting out of both persons' actions, intentions, and understanding in order to determine the outcome of two decisions: first, whether the woman chose to have intercourse; and second, whether the accused chose to have intercourse knowing that the woman did not consent to intercourse. Failure to establish that the woman did not choose to have intercourse means that conviction is not possible, because the accused cannot have performed an illegal act. However, because the test to be applied is one of subjective liability, before it can be demon-

³⁶ *The Sexual Offences (Amendment) Act, 1976*, c. 82, s. 1(1) (U.K.).

³⁷ *The Sexual Offences (Amendment) Act, 1976*, c. 82, s. 1(2) (U.K.).

³⁸ For an overview of the impact of the *Morgan* decision in Australia, see Scutt, *The Australian Aftermath of D.P.P. v. Morgan* (1977), 25 Chitty's L.J. 289. Berger's recent and comprehensive article, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom* (1977), 77 Colum. L. Rev. 1, distinguishes between American law and British law in light of the *Morgan* decision. She concludes (at 61-62) that the prevailing American view does not accord well with the more subjective element embedded in the basic structure of criminal law. Also see Note, *supra* note 24, at 1533.

³⁹ *Heilbron Report*, *supra* note 28, at 2.

strated that the accused chose to do what the law forbids, it is necessary to show that he believed, or understood, that the complainant did not consent. If he genuinely (not necessarily reasonably) believed that she consented, even if in fact she did not, then he cannot be held liable for choosing to have intercourse without consent.

In many instances, particularly if there is evidence of substantial physical violence, the requirements of the law pose no additional problem, because the accused cannot credibly base his defence on consent. However distasteful it is for the victim to have to testify to what happened, at least she is spared the challenge to her veracity and basic integrity that necessarily arises when consent is claimed by the accused. In the absence of such unequivocal evidence, on the other hand, (in many instances evidence of the use of physical force may well be consistent with consent) determining the intentions and understanding of the two persons becomes the crucial, and frequently intractable, problem.⁴⁰ The accused is allowed to attempt to convince the jury of the disposition of the woman to consent to intercourse with him, so that if she denies the allegation of consent she will not be believed (she may indeed be lying), or, if she is believed, her demonstrated disposition to consent (even if it is believed by the jury that she did not consent) is sufficiently well established to make it possible for the jury to conclude that the accused (without being reckless) genuinely did not at the time understand that she did not consent. The law of rape provides the basis for this type of defence, but it is often a wretchedly demeaning process for a woman to endure, and it was the announced purpose of Bill C-52 to reduce the frequency of its occurrence.

The criterion of subjective liability requires close scrutiny of the actions, intentions, and understanding of both the complainant and the accused. This is due to the legal importance of the decisions of both persons. This importance, however, is itself a result of the *right* of each person to make such a decision. If a complainant were clearly below the age required to have a recognized right to consent to intercourse, the nature of her decision would not have to be examined closely because she would be denied the right to make a legally significant decision. In such circumstances, a man accused of rape cannot base his defence on the contention that she consented (even though he may reasonably and genuinely believe that she did) because the young woman is, by reason of age, unable in law to consent. The alleged belief that she did consent is thereby robbed of its legal force, and as a result the complainant is spared the ordeal of denying the allegation that she did consent, or that she did seem to consent.

The need to inquire into the decisions or apparent decisions of both persons rests on the legal status of their decisions. Underlying their legal right to make a decision is the highly valued norm or principle of personal volition and personal autonomy. Briefly put, this means that, with only minor exceptions, all adults are recognized as having a basic jurisdiction over themselves, and thus they have a wide sphere of action in which they have a right

⁴⁰ Leigh, *Sado-Masochism, Consent, and the Reform of the Criminal Law* (1976), 39 Mod. L. Rev. 130.

of choice. This includes religious, economic, educational, political, artistic, and sexual activities.⁴¹ Because this principle of autonomy has been extended to include women as well as men, the right of choice to which it gives rise has now become, essentially, an equal right of choice. Thus, one's obligations in general, and particularly those obligations that are supported by legal enforcement, are seen as originating in a set of implicit or explicit choices across a broad range of human concerns. Accordingly, legal liability stems from a refusal to meet an obligation that originated in a choice, or from choosing to act in such a way as to infringe on an area of concern that is subject to the right of choice of another. Operating within this context of an equal right of choice, the law of rape is applied to a situation in which both parties have an equal right to choose to have intercourse, and both have a right not to suffer legal punishment unless it is demonstrated that they chose to do what the law prohibits—that is, to infringe or violate this right of choice of the other. It is the equal right of choice that underlies the legal recognition of the right of both persons to make decisions about intercourse, and thereby necessitates an examination of both persons' decisions.

Intercourse without consent is accepted as a serious violation of a woman's rights. It is a violation not only of her body, but also of her very sense of self. Even in the absence of serious bodily harm it is a violation of an important right closely connected to one's sense of self or self-worth. To take this sense of personal autonomy seriously, and to insist that it be reflected in the law, has the result of giving legal standing to a woman's right of choice, but it also has the effect of buttressing the equal right of choice as it applies to the defendant. It would be an equally serious violation of his right of choice if he were to be convicted of a serious violation of the right of a woman, without scrupulous attention being paid to the question of whether he did in fact choose to do what was forbidden.

Because the right of choice is applicable both to the complainant and to the accused, the emphasis on the seriousness of rape as a violation of this right also serves to entrench the right of the accused not to be held legally culpable except as a result of his actual choice. Moreover, it is this right that permits the defence to press so hard to demonstrate that the complainant did consent and, failing this, that her behaviour was such that the accused believed that she did consent. The more solidly entrenched this right is, the more odious the trial process is likely to be for the woman. The very principle that establishes a woman's jurisdiction over her own body is the same

⁴¹ The history of the application of the right of choice to political and economic matters is now an old story. However, the implications of viewing virtually all human relationships in this manner are much less clearly sorted out. For a recent effort along these lines, see Gauthier, *The Social Contract as Ideology* (1977), 6 Philosophy and Public Affairs 130. Gauthier contends that radical contractualism, first formulated by Thomas Hobbes, has become a basic presumption of our thought such that "... our thoughts and activities, insofar as they concern ourselves and our relationships, are best understood by supposing that we treat all of these relationships as if they were contractual. Only the relation of hostility is excluded from the scope of the contract, and only it is natural to man. All other human relationships are treated as essentially similar in character, and all are conventional, the product of human agreement." (at 135).

principle that gives legal standing to the defence counsel's attempt to discredit the complainant.

IV. CONCLUSIONS

The reformulation of rape as a special form of assault does exhibit a conceptual consistency, and to this there can be no objection. However, in advocating this change, the Canadian report on sexual offences offers nothing persuasive to substantiate the prediction that change of this kind will significantly alleviate the problems that it identifies. Indeed, it expresses the desired improvement in very tentative language. In contrast, the similar proposals of Bill C-52 were accompanied by much more extravagant statements about what could be achieved by redefinition. These expectations are entirely without foundation, because the issue of consent is not to be avoided and, in light of the *Morgan* decision, must be assessed in a very subjective manner. This is entirely consistent with the right of choice that is at the heart of contemporary concepts of criminal liability, but it can only reinforce the objectionable aspects of the investigative and judicial procedures for the complainant.

When Bill C-52 was given first reading, its amendments on rape were very well received by the organizations most concerned with the impact of the existing law on women. Despite the fact that the Bill died on the order paper at the end of the last session of Parliament, it indicates the direction of future change by announcing the trends in government policy. If the proposals on rape were to become law, their non-substantial nature eventually would become clear to those who now believe that they have some substance. Should this occur, it would undoubtedly spark a renewed militancy, with the perception of the basic inequity of the law compounded with a feeling of betrayal. However, in the interim—that is, until the lack of substance becomes clear—attention will be diverted from the task of grappling with the existing law to strike an appropriate balance between the rights of the accused and the impact of the legal procedures on the complainant. The tightening of the restrictions on the defence lawyer's examination of the complainant's sexual history, and the elimination of the corroboration requirement as part of the necessary instructions to the jury, are both examples of recent changes in precisely this direction. It is possible that piecemeal changes of this type will not be adequate to overcome the difficulties faced by the complainant. If this proves to be the case, then reliance on the underlying principle of subjective liability may have to be re-examined. To move away from subjective liability and towards objective liability would probably require specific legislation to set the law in Canada clearly apart from the law in Britain.⁴² It is not entirely clear that an explicit divergence from the British situation is warranted, and it may therefore be premature to take a definite position. What is clear is that there is nothing to be gained by having false hopes raised, and basic legal principles obfuscated, by the proposals in Bill C-52.

⁴² For an argument that precisely this kind of change is required, see Curley, *Excusing Rape* (1976), 5 *Philosophy and Public Affairs* 325.