

**MENS REA IN RAPE: MORGAN AND THE
INADEQUACY OF SUBJECTIVISM**
or
**WHY NO SHOULD NOT MEAN YES IN THE EYES OF
THE LAW**

BY JAMES FAULKNER

[This article examines the influential decision of the House of Lords in *Morgan*, where a charge of rape was contested on the ground that the accused had believed the victim to be consenting to sexual intercourse. The majority decision that a man's belief in consent, regardless of its reasonableness, is a good defence to a charge of rape is considered, with particular reference to the concept of criminal negligence and the doctrine of mistake. It is argued that the decision is untenable, both in terms of formal precedent and the liberal philosophical premises underlying the criminal justice system.]

1. INTRODUCTION

On August 15, 1973, William Morgan invited three friends into his home to have sex with his wife. He told them that his wife was 'kinky', that she enjoyed feigning resistance to sex, and that any such resistance should be ignored. The three friends were subsequently charged with rape. Daphne Morgan maintained that she had not consented to sexual intercourse. The three friends argued that they had believed what William Morgan had told them, and, as a consequence, had honestly believed that Daphne Morgan was consenting. The House of Lords held that a charge of rape could not be sustained against the three men if they had believed that Daphne Morgan was consenting. The court also held that their belief need not be based on reasonable grounds.

Since the decision of the House of Lords in *R. v. Morgan*¹ in 1976, the nature of the mental element in the crime of rape has attracted a great deal of attention. The issue itself is not a new one, and before the decision in *Morgan* there had been much academic debate² as to whether rape, being a serious crime, required proof of an actual malicious mental attitude on the part of the accused or whether gross irresponsibility would suffice. By adopting the former requirement *Morgan* served to crystallize and to some extent polarize the debate, and the case has since been influential as judicial authority not only in Britain, but also in Australia³ and Canada.⁴

* LL.B. (Hons) (A.N.U.), B.A. (A.N.U.). Barrister and Solicitor of the Supreme Court of the A.C.T.; Commonwealth Attorney-General's Department.

¹ [1976] A.C. 182.

² E.g. Williams, G., *Criminal Law: The General Part* (2nd ed. 1961) 122-4; Hall, J., 'Negligent Behaviour Should Be Excluded From Penal Liability' (1963) 63 *Columbia Law Review* 632; Hart, H. L. A., 'Negligence, Mens Rea, and Criminal Responsibility' in *Punishment and Responsibility* (1968) 136; Fletcher, G. P., 'The Theory of Criminal Negligence: A Comparative Analysis' (1971) 119 *University of Pennsylvania Law Review* 401.

³ See *R. v. Saragozza* [1984] V.R. 187; *R. v. McEwan* [1979] 2 N.S.W.L.R. 926; *R. v. Wozniak* (1977) 16 S.A.S.R. 67; *R. v. Brown* (1975) 10 S.A.S.R. 139; *R. v. Maes* [1975] V.R. 541.

⁴ See *Pappajohn v. The Queen* (1980) 111 D.L.R. 1.

Morgan's influence as judicial authority in Australia has not been negated by the introduction of sexual assault legislation in the states. The Crimes Act 1958 (Vic.) and the Criminal Law Consolidation Act 1935 (S.A.) both provide for an offence of rape which, apart from a broadening of the *actus reus* component of the crime is synonymous with rape at common law.⁵ In New South Wales and the Australian Capital Territory s. 61D of the Crimes (Sexual Assault) Amendment Act 1981 (N.S.W.) and s. 92D of the Crimes Amendment Ordinance 1985 (A.C.T.) respectively, create offences corresponding to the common law crime of rape⁶ which do not rule out the *Morgan* defence. The position under the criminal codes of Tasmania, Western Australia, Queensland and the criminal legislation of the Northern Territory is different, and the codes in these states effectively provide that gross negligence will ground a conviction for rape.⁷ The end result, however, is that the majority of Australia's population is still effectively subject to the law as shaped by the *Morgan* decision — by way of sexual assault legislation.

The decision in *Morgan* has been the cause of controversy outside the world of legal practitioners and academics. It serves as a focus for an issue which is of fundamental importance in liberal-democratic societies. This is the balance which must be struck between the protection of those who are accused of crimes and the protection of those who are potential victims of crime. In a more general sense, the courts must try to strike a balance between justice for the individual and just public standards of conduct. The courts must try to reconcile the liberal ideal of a criminal justice system based on individual culpability and responsibility with the co-existent liberal ideal of socially imposed and legally sanctioned objective standards of care — standards which serve to limit the ability of one individual to exercise his or her freedom to the point where it infringes that of another.

The issue of *mens rea* in *Morgan*, then, may be seen not only as a contentious legal problem but also as the focus for a debate about liberal philosophy and practice. The purpose of this article is to examine the philosophical basis of a decision which effectively proclaims the pre-eminence of the individual rights of the accused over and above the well-being of the community. In *Morgan*, pure individualism is posited as the key-stone of liberal philosophy and criminal justice and, consequently, of common law procedures.

The importance of the idea of the 'guilty mind' or *mens rea* in relation to criminal culpability is well established in liberal jurisprudence. The meaning of this idea, however, has never been definitively established.⁸ The English textbook authors, Smith and Hogan, make this clear when they comment:

⁵ Crimes Act 1958 (Vic.) ss 4, 45; Criminal Law Consolidation Act 1935 (S.A.) ss 5, 48.

⁶ Again, apart from a wider scope for the meaning of 'sexual intercourse'.

⁷ In these jurisdictions the code provisions have been interpreted as providing that the only mental element required for the crime of rape is intent to have sexual intercourse. Absence of consent is a separate issue. Mistaken belief in consent raises the separate defence of mistake and must be based on reasonable grounds. See Warner, K., 'The Mental Element and Consent Under the New "Rape" Laws' (1983) 7 *Criminal Law Journal* 245, 249.

⁸ Lacey has alluded to the potential for disagreement amongst 'liberal' theoreticians. See Lacey, N., 'Punishment and the Liberal World' (1987) 11 *Bulletin of the Australian Society of Legal Philosophy* 70, 70-1.

Mens rea is a technical term. It is often loosely translated as 'guilty mind', but this translation is frequently misleading. A man may have *mens rea*, as it is generally understood today, without any feeling of guilt on his part. He may, indeed, be acting with a perfectly clear conscience, believing his act to be morally, and even legally, right, and yet be held to have *mens rea*.⁹

Nevertheless, what can be said about the *mens rea* requirement is that it implicitly establishes the idea of *culpability* as a central factor in criminal prosecutions. While the particular indicia of the 'guilty mind' have varied over time, the notion of culpability has remained as the touchstone of liberal arguments concerning the necessity of a *mens rea* test.

The common law requirement in relation to culpable mental attitude is often rather cryptically referred to as 'the criminal mind'.¹⁰ This requirement's ostensible role is to preclude the possibility of any person being punished for an act that is not somehow morally blameworthy or attributable only to his or her irresponsibility. Put another way, this article of liberal criminal justice theory exists to ensure that no person is punished for any act which he or she did not in some broad sense intend.¹¹ However, this does not necessarily mean that the *mens rea* test will inevitably turn on the question whether the accused consciously intended to do a prohibited act. Criminal trials certainly involve investigations into the accused's ability to act of his or her own volition (including consideration of the sanity of the accused as well as issues of provocation and coercion), but the question of criminal *culpability* may well turn on issues other than the nature of the defendant's motives.

Morgan has been hailed by many academics, practitioners and judges as a long overdue legal precedent guaranteeing a kind of legitimate protection for the individual — that is, protection for the individual against punishment in respect of unintentional wrongdoing.¹² However, I will endeavour to demonstrate that the decision in *Morgan*, in its own formal terms, was an incorrect decision. I will argue that the court, on the authorities as they stood, could and should have decided that the subjective intention of the accused is not the sole consideration in an enquiry into the culpability of that person's deliberate interference with another person's body.

2. THE POSITION IN MORGAN: MENS REA AND INTENTION

One of the central passages in the *Morgan* decision is Lord Hailsham's discussion of what he believes to be the illogical nature of certain arguments

⁹ Smith, J. and Hogan, B., *Criminal Law* (6th ed. 1988) 55.

¹⁰ E.g. Tur, R. H. S., 'Rape: Reasonableness and Time' (1981) 1 *Oxford Journal of Legal Studies* 432.

¹¹ The criminal justice system has, as a consequence, always been slow to acknowledge 'strict liability' as a basis for criminal offences. In fact, as Professor Singer points out, there is a growing tendency in the literature to argue that strict liability offences are non-criminal. This is in addition to the courts' traditional tendency to 'read in' a mental element when dealing with a serious statutory offence which does not expressly deny the need to establish *mens rea*: Singer, R. G., 'The Resurgence of *Mens Rea*: III — The Rise and Fall of Strict Liability' (1989) 30 *Boston College Law Review* 337.

¹² Kenny, C. S., *Outlines of Criminal Law* (9th ed. 1918); Turner, J. W. C., *Russell on Crime* (10th ed. 1950); Williams, G., *Criminal Law: The General Part* (2nd ed. 1961); Smith, J. and Hogan, B., *Criminal Law* (6th ed. 1988); Cawley, D., 'The Retreat From *Morgan*' (1982) *Criminal Law Review* 198; Williams, G., 'The *Mens Rea* for Murder: Leave It Alone' (1989) 105 *Law Quarterly Review* 387.

presented to him. These arguments were to the effect that a man's belief in a woman's consent to sexual intercourse must be reasonable before that belief may work to negate the requisite *mens rea* for the crime of rape. Lord Hailsham says:

Once one has accepted, what seems abundantly clear, that the prohibited act in rape is non-consensual sexual intercourse, and that the guilty state of mind is an intention to commit it, it seems to me to follow as a matter of inexorable logic that there is no room either for a 'defence' of honest belief or mistake, or for a defence of honest and reasonable belief or mistake. Either the prosecution proves that the accused had the requisite intent, or it does not. . . . Since honest belief clearly negatives intent, the reasonableness or otherwise of that belief can only be evidence for or against the view that the belief and therefore the intent was actually held.¹³

This passage is crucial because it purports to define authoritatively both the *actus reus* and the *mens rea* for the common law offence of rape, and because it uses this definition to vindicate the 'subjectivist' position at the expense of the 'objectivist' position. I use the term 'subjectivism' to describe the view that the *mens rea* requirement for rape may only be satisfied where the accused intended to commit the prohibited act.¹⁴ This means then, that the requisite *mens rea* cannot exist when the accused *subjectively* believes the woman is consenting. In contrast, 'objectivism' describes the view that this *subjective* belief of the accused can only be exculpatory if it can be shown to be *objectively* reasonable or, put another way, if a reasonable person in the accused's position could hold such a belief.

Although *Morgan* was decided by a majority and therefore represents at least two different opinions as to the question of *mens rea* in the law of rape, in the passage cited above Lord Hailsham articulates the fundamental understanding supporting the majority decision. In particular, he gives expression to the pervasive conviction that as far as the crime of rape is concerned, the self-referential motivation of the accused is the true and necessary focus of any inquiry into culpability, not the issue of whether the accused formed reasonable beliefs in relation to the victim. As will become clear, Lord Hailsham's semantic emphasis upon the literal meaning of intention betrays a tendency to subordinate the victim's autonomy in the interests of the accused's liberty.

This section of the article will explore the bases of Lord Hailsham's argument and in so doing will concentrate on two major issues: first, the definition of rape itself and the meaning of 'intention' in this specifically legal context; and second, the relation between Lord Hailsham's legalistic arguments and more general philosophical arguments concerning the nature of the criminal justice system. In sections three and four I consider the problematic role of the *Morgan* decision in the development of both the doctrine of mistake and the concept of criminal negligence, while in the final section I draw some conclusions regarding a more appropriate social orientation for the criminal law as it applies to rape.

With regard to the first issue — the definition of rape — Lord Hailsham suggests, in addition to his previously quoted statement, that as far as the crime

¹³ *Morgan*, *supra* n. 1, 214.

¹⁴ The *actus reus* of rape is defined in the Crimes (Amendment) Ordinance (No. 5) 1985 (A.C.T.) ss 92(1), 92A-D; Crimes Act 1900 (N.S.W.) ss 61A-D as amended by the Crimes (Sexual Assault) Amendment Act 1981 (N.S.W.); Northern Territory Criminal Code 1983, s. 192; Queensland Criminal Code 1899 s. 347 (as amended); Crimes Act 1958 (Vic.) ss 2A(1), 45 (as amended by Crimes (Sexual Offences) Act 1980 (Vic.); Western Australia Criminal Code 1924 ss 324D, 324F (as amended by Acts Amendment Act (Sexual Assaults) Act 1985 (W.A.)).

of rape is concerned, 'the prohibited act is sexual intercourse without consent, and the intention is to do the prohibited act, that is to have sexual intercourse without consent or irrespective of whether the victim consents or not'.¹⁵ Leaving aside for a moment the issue of the apparent broadening of the mental element in the final part of this passage and the related issue of recklessness as an aspect of *mens rea*, in Lord Hailsham's definition there is a clear requirement of an actual intention on the accused's behalf to do the prohibited act. The important point to note here is that the word 'intention' is being used in a way which limits its meaning to willing or desiring a specific result: in this case sexual intercourse with a woman who is not or may not be consenting. Lord Hailsham suggests that there is compelling authority to support this definition of the mental element in the crime of rape:

First among these authorities I would cite the traditional definition of rape as enshrined in paragraph 2871 of the current *Archbold, Criminal Pleading, Evidence and Practice*, 38th ed. (1973): 'Rape consists in having unlawful sexual intercourse with a woman without her consent by force, fear, or fraud' for which are cited as authorities 1 *East's Pleas of the Crown* 434 and 1 *Hale's Pleas of the Crown* 627.¹⁶

He is forced to concede, however, that this definition contains no express reference to the mental element. The point for Lord Hailsham is that it would be 'repugnant for any common law offence of this gravity to lack a mental element', and that

both statutory and common law offences employ habitually in their definitions words which impliedly [*sic*] import into the definition of the crime an implication of an intent or state of mind in the accused. I regard the words 'force, fear, or fraud' as of this sort.¹⁷

Lord Hailsham rejects outright the notion that these words simply described factors which might serve to disprove consent. In effect he contends that serious crimes generally require *mens rea*, that is, a 'criminal mind', and given that rape is a serious offence it requires an 'intention' on the part of the accused to be proved. However, Lord Hailsham is also contending, and this is not supported by any authority cited, that 'intention' here should be understood not in a wide, legal sense of *mens rea* or 'guilty mind', but in a more ordinary everyday and restrictive sense connoting active or conscious intent. This is, in fact, a conflation of two distinct concepts: the concept of conscious intention and the more general criminal requirement of *mens rea* about which Stephen has stated

the maxim about 'mens rea' means no more than that the definition of all or nearly all crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of the different crimes.¹⁸

The judges of the majority in *Morgan*, Lord Cross, Lord Hailsham, and Lord Fraser, provide no other compelling authority than that cited by Lord Hailsham for the position he advocates, although they do cite more recent authorities in line with his position which are said to derive from that earlier cited authority.¹⁹

¹⁵ *Morgan*, *supra* n. 1, 210.

¹⁶ *Ibid.*

¹⁷ *Ibid.* 210-1.

¹⁸ Stephen, J. F., *A History of the Criminal of England* [*sic*] (vol. 2, 1883) 95 as quoted in Smith, A. T. H., 'On Actus Reus and Mens Rea' in Glazebrook, P. R. (ed.), *Reshaping the Criminal Law* (1978) 103.

¹⁹ *R. v. Hornbuckle* [1945] V.L.R. 281; *R. v. Daly* [1968] V.R. 257; *R. v. Flannery and Prendergast* [1969] V.R. 31; and *R. v. Burles* [1947] V.L.R. 392.

It is clear, therefore, that Lord Hailsham's contention that he is bound by authority to reject the objectivist argument is *not* based on any unequivocal reasoning to be found in the authorities themselves. Rather, it is based on his conviction that *mens rea* should be an element in serious offences and that *mens rea* equates with specific or conscious intent. He states that:

I believe that 'mens rea' means 'guilty or criminal mind', and if it be the case, as seems to be accepted here, that the mental element in rape is not knowledge but intent, to insist that a belief must be reasonable to excuse is to insist that either the accused is to be found guilty of intending to do that which in truth he did not intend to do, or that his state of mind, though innocent of evil intent, can convict him if it be honest but not rational . . . this is to insist on an objective element in the definition of intent, and this is a course which I am extremely reluctant to adopt . . .²⁰

Although this passage is somewhat confusing as a result of Lord Hailsham's arbitrary introduction of the concept of *rationality* (as opposed to reasonableness) into the objectivist/subjectivist debate, it at least makes clear that he does not accept the possibility that 'intent' may sometimes have a different or wider legal meaning than the one he ascribes to it. And this is the important point, given that Lord Hailsham's argument in relation to the 'absurdity' of introducing an objective element into the *mens rea* requirement for rape depends on his understanding of the meaning of 'intent'. Lord Hailsham's argument begins with the fairly unexceptionable observation that 'criminal mind' (or *mens rea*) implies a form of intent, which, however, says nothing concrete about the actual state of a person's mind.²¹ Nevertheless his Lordship goes on to claim that if a man's belief in the woman's consent must be reasonable to excuse, then this makes nonsense of the idea that the criterion for culpability is intention (here read 'desire') to do the prohibited act. Lord Hailsham makes no distinction between a *conscious* 'evil intent' and what the law might regard as a culpable state of mind. For this same reason he finds objectivist arguments for the inclusion of an objective element in the *mens rea* test for rape illogical.

To return to the issue of recklessness in relation to rape, the first point to be made is that Lord Hailsham's formulations of the elements of the crime of rape are not consistent. As has been noted,²² Lord Hailsham initially states in no uncertain terms that the prohibited act in rape is non-consensual sexual intercourse and that the guilty state of mind is an intention to commit it. However, later in his judgement he suggests that notwithstanding that the prohibited act is sexual intercourse without consent, the requisite intention 'is to do the prohibited act, that is to have sexual intercourse without consent *or irrespective of whether the victim consents or not*' (emphasis added).²³ Clearly, this slightly confusing reformulation of the nature of the mental element is necessary because Lord Hailsham wishes to include recklessness as a sufficient form of *mens rea* for rape while maintaining that *mens rea* requires an intention to commit the prohibited act. Nevertheless, the fact that Lord Hailsham finds it necessary to manipulate the mental element in his definition of rape in order to make the consequences of a reckless act 'intentional' demonstrates that where the *actus reus* for rape is non-consensual intercourse, recklessness cannot be characterized as an intention — in

²⁰ *Morgan supra* n. 1, 210.

²¹ *Supra* nn. 9, 18 and accompanying text.

²² *Supra* n. 13.

²³ *Morgan, supra* n. 1, 210.

the literal sense of the word — to do the prohibited act. Recklessness involves a determination to have sexual intercourse, but it does not necessarily involve a determination to have non-consensual sexual intercourse. A reckless man does not care whether a woman consents to sexual intercourse: at most, he may be said to intend to risk the possibility of non-consensual sexual intercourse. The essential point, however, is that the acceptance of recklessness as a sufficient form of *mens rea* for the crime of rape tends to suggest that 'intention' for the purposes of the definition of rape is, in fact, a specialized term which has a wider meaning than Lord Hailsham is prepared to concede in his argument against the inclusion of any objective element in the *mens rea* test for rape.

The judges in the minority in *Morgan* also dispute the view that there is compelling authority to support Lord Hailsham's contention that a *mens rea* requirement will not be satisfied by a finding of unreasonable carelessness or negligence. Lord Simon states that:

To say that, to establish a charge of rape, the Crown must show on the part of the accused 'an intention to have sexual intercourse with a woman without her consent' is ambiguous.²⁴

Lord Simon goes on to disagree with Lord Hailsham's contentions that he has authority on his side, and that the criminal law demands only an honest and genuine belief on the part of the accused concerning the woman's consent to avoid a charge of rape. Lord Simon justifies his opposite finding when he says:

It remains to consider why the law requires, in such circumstances, that the belief in a state of affairs whereby the *actus* would not be *reus* must be held on reasonable grounds. One reason was given by Bridge J. in the Court of Appeal . . . I agree; but I think there is also another reason. The policy of the law in this regard could well derive from its concern to hold a fair balance between victim and accused. It would hardly seem just to fob off a victim of a savage assault with such comfort as he could derive from knowing that his injury was caused by a belief, however absurd, that he was about to attack the accused. A respectable woman [*sic*] who has been ravished would hardly feel that she was vindicated by being told that her assailant must go unpunished because he believed, quite unreasonably, that she was consenting to sexual intercourse with him.²⁵

Clearly, Lord Simon is concerned, as is Lord Hailsham, to emphasize the importance of defending the accused's interests in requiring that *mens rea* be established, but this does not detract from an acknowledgement that *mens rea* is a term used in a system which does not only seek to protect the accused. The system as a whole must attempt to strike a balance between accused and victim, and the requisite *mens rea* must vary given the varying nature of crimes and the varying requirements of justice.

Bridge J.'s decision in the Court of Appeal in *Morgan*²⁶ is also invoked by Lord Simon and in it are to be found authorities which tend to run counter to Lord Hailsham's argument. In the Court of Appeal, Bridge J. stated that the question raised by *Morgan* was not conclusively decided by any English authority and that the only relevant early authority he was aware of was that provided by *R. v. Flattery*.²⁷ This case suggests that the accused's belief must be a reasonable one,²⁸ but as Bridge J. stated, it is not conclusive on the point. He went on, however, to introduce the concept of 'mistake' and to say that:

²⁴ *Ibid.*

²⁵ *Ibid.* 220-1.

²⁶ *Ibid.* 185.

²⁷ (1877) 2 Q.B.D. 410.

²⁸ *Ibid.* 414 and *R. v. Flattery* 13 Cox C.C. 308, 392.

To resolve the conflict it is necessary first to examine the principles underlying the defence of mistake in the criminal law, secondly to consider how those principles apply to the offence of rape, which although now statutory, still requires to be defined by the common law.²⁹

Bridge J. considered *R. v. Tolson*,³⁰ a bigamy case, a useful starting point in elucidating the law of mistake. In that case Cave J. says:

At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence.³¹

Bridge J. went on to consider other judgments which tended to support the line adopted in *Tolson*. However, the important point to make about Bridge J.'s judgment is that it deals with the general principle underlying the particular authorities. While he does not deal adequately with the relationship between the elements of a crime and the possible defences to it, his examples of crimes which clearly require mistakes of fact to be reasonable before they can be excused demonstrate the confusion underlying Lord Hailsham's argument that serious crimes require only a more narrowly defined intention on the part of the accused to satisfy the *mens rea* element.

Bridge J.'s ultimate finding is itself open to some dispute. He holds that the rationale underlying the requirement that there must be reasonable grounds for the accused's mistaken belief is that a bald assertion of belief for which the accused can indicate no reasonable ground is not evidence of sufficient substance to raise any issue of non-culpability requiring the jury's consideration.³² However, this is not the issue for the moment. At this point it is enough to recognize that there is no direct authority to justify Lord Hailsham's narrow use of 'intention' as it relates to the *mens rea* requirement in rape. Consequently, his specifically legalistic argument concerning the illegitimacy of requiring the accused's mistake of fact to be reasonable before allowing it to negate *mens rea*, while initially plausible, is not ultimately convincing or conclusive.

The second issue here is the nature of the philosophical premises underlying the decision in *Morgan*. As has been observed, the majority decision is based on the view that for the purposes of rape the 'criminal mind' is one which intends, quite specifically, to commit the prohibited act. Hence, even an unreasonable belief that consent was present would negate the possibility of satisfying the *mens rea* requirement. As Lord Hailsham puts it:

Otherwise a jury would in effect be told to find an intent where none existed or where none was proved to have existed. I cannot myself reconcile it with my conscience to sanction as part of the English law what I regard as logical impossibility, and, if there were any authority which, if accepted would compel me to do so, I would feel constrained to declare that it was not to be followed.³³

Underlying this argument is the conviction that it would be unconscionable to attribute a guilty or 'criminal mind' to one who did not know or intend his culpability — it would, apparently, be contrary to the requirements of the system of justice which underpins the *moral* orientation of the liberal society. The

²⁹ *Morgan supra* n. 1., 188.

³⁰ (1889) 23 Q.B.D. 168.

³¹ *Ibid.* 181, as cited in *Morgan* [1976] A.C. 188.

³² *Morgan supra* n. 1, 191.

³³ *Ibid.* 213.

subjectivist purports to justify himself or herself by reference to the broader criminal justice system which reflects certain fundamental moral requirements of liberal society. If, however, the liberal society is not concerned solely to protect the welfare of the *particular* individual but instead is concerned to protect socially enforceable individual rights to the processes of justice of *all* members of the community, the reasoning of the majority in *Morgan* may be seen to rest on unsound foundations. Clearly, an argument which posits *mens rea* and conscious intention as necessarily equivalent terms would lose any plausibility it may have had on the basis of Lord Hailsham's understanding of the nature of the moral orientation of the criminal justice system.

The criminal justice system requires *culpability* to ground criminal liability, however, it will always remain to articulate the indicia of culpability for particular crimes. Such articulation in respect of the crime of rape may well refer to mental attitudes beyond both a conscious desire to have sexual intercourse without consent and recklessness as to that consent.³⁴

3. MENS REA AND THE DOCTRINE OF MISTAKE

Bridge J., in a passage cited above,³⁵ adverts to the problem of trying to decide how the common law doctrine of mistake operates in relation to the crime of rape. He implies that there are a number of common principles which govern both the operation of mistake and the specific elements and circumstances of the crime. However, his analysis does not go so far as to address the basis of the distinction between the nature of defences which may be said to operate after the elements of the crime have been established such as duress and provocation, and a 'defence' such as mistake which works to negate a requisite element of criminal behaviour. I consider that distinction later in this section.

At this point though, it should be acknowledged that when discussing the nature of the defence of mistake, one is concerned to look into the nature of criminality and by extension into the fundamental objectives of the use of an analytical term such as '*mens rea*'. Bridge J. does not make this clear. As a consequence, his appeal to authorities such as *Tolson* (which is made, in fact, on the basis that such authorities provide examples of the interactive relationship between the nature of mistake as a defence and the requirements of *mens rea*) is more easily dismissed as an appeal to particular authorities which are capable of being distinguished from the case of rape. These authorities are said to be distinguishable on the basis that they do not deal with *mens rea* as such but with the separate defence of mistake. This conclusion allows for the further argument that *mens rea* itself has a separate and circumscribed meaning for the purposes of criminal justice. The decision in *Tolson*, for example, is consequently characterized as an instance of the operation of a particular criminal defence of limited scope. Lord Cross, one of the majority in *Morgan*, distinguishes *Tolson* on the ground that it deals with the defence of mistake as it applies to statutory offences:

³⁴ *E.g. infra* n. 72.

³⁵ *Supra* n. 30.

In fact, however, I can see no objection to the inclusion of the element of reasonableness in what I may call a 'Tolson' case . . . if the definition of the offence is on the face of it 'absolute' and the defendant is seeking to escape his prima facie liability by a defence of mistaken belief, I can see no hardship to him in requiring the mistake — if it is to afford him a defence — to be based on reasonable grounds. As Lord Diplock said in *Sweet v. Parsley* [1970] A.C. 132, there is nothing unreasonable in the law requiring a citizen to take reasonable care to ascertain the facts relevant to his avoiding doing a prohibited act. . . . But, as I have said, s. 1 of the Act of 1956 [Sexual Offences Act 1956 (UK)] does not say that a man who has sexual intercourse with a woman who does not consent to it commits an offence; it says that a man who rapes a woman commits an offence.³⁶

The statutory provision referred to in this passage leaves rape to be defined by the common law. It should be noted, however, that Lord Cross implicitly acknowledges that it is appropriate when implying a mental element in a statutory offence to make *only* an honest and reasonable mistake on the part of the accused an exculpatory mental attitude. This acknowledgement is significant for two reasons: first, because it graphically illustrates the difficulty of considering the defence of mistake without also addressing the larger issue of criminal culpability; and second, because it effectively amounts to an admission that the *mens rea* requirement should sometimes be satisfied by a negligent mental attitude.

In contrast to Bridge J.'s understanding of the doctrine of mistake, Lord Hailsham adopts a more straightforward approach when he says that there is 'no room' in the crime of rape for a 'defence' of mistake and that the prosecution either proves that the accused had the requisite *mens rea* or it does not.³⁷ Lord Hailsham's formulation of the mistake question allows him to completely bypass the problem of whether mistakes should be reasonable in order to exculpate: if there is a mistake of fact as to the consent of the woman there is simply not the requisite *mens rea* for the crime of rape. Lord Hailsham's general view is more comprehensively described by Williams in his defence of the Canadian case of *Pappajohn v. The Queen*³⁸ which applied the reasoning of the majority in *Morgan* so that

an accused who acted under a mistake which effectively negated the *mens rea* must be acquitted. Defined, mistake of fact occurs for the purpose of the criminal law, where an accused holds a positive belief in a fact or a state of facts which is untrue, but in furtherance of the mistaken belief commits the *actus reus* of an offence. . . . It will be seen then, that mistake of fact is not a 'defence' in the same sense that provocation, self-defence, duress and necessity are defences. The latter defences *justify* or *excuse*, either partially or totally, what would otherwise be criminal conduct. A mistake of fact which negates the *mens rea* renders the committed act innocent and thus there never arises any question of exonerating criminal conduct. . . . An accused may thus be acquitted, notwithstanding proof of the commission of the prohibited act, because the crown failed to prove the mental element of the crime.³⁹

This general position is also adopted by the text book authors Smith and Hogan, who go on to state that the doctrine of mistake results from the simple application of the general principle that 'the prosecution must prove its case, including the *mens rea* or negligence'⁴⁰ stipulated in the definition of the crime.

These reformulations of Lord Hailsham's views help to expose two assumptions which require closer examination. First, there is the continuing use of *mens*

³⁶ *Morgan supra* n. 1, 202-3.

³⁷ *Ibid.* 214.

³⁸ [1980] 2 S.C.R. 120.

³⁹ Williams, J. M., 'Mistake of Fact: The Legacy of *Pappajohn v. The Queen*' (1985) 63 *Canadian Bar Review* 597, 604-5.

⁴⁰ Smith, J. and Hogan, B., *Criminal Law* (5th ed. 1983) 188, emphasis added.

rea as a legal term of circumscribed meaning which does not comprehend negligence. In the context of a discussion of *mens rea* and mistake it is appropriate to challenge the assertion that mistakes of fact need only be genuine (and not reasonable) to excuse whenever the criminal law requires *mens rea* to be satisfied.

Second, there is the illegitimate presentation of *mens rea* as a non-variable factor to be used in a formal calculus of criminality. It will be argued that the terminology itself is not being employed in its proper, limited role — that is, as a tool for characterizing complex factual situations in such a way that they will correspond to a formal and workable system of rules. Rather, it is being presented as the immutable foundation and well-spring of those rules.

(i) '*Honest*' mistakes are sometimes culpable mistakes

In relation to the first point, Smith and Hogan are in agreement with Lord Hailsham's conclusion that where *mens rea* — as opposed to negligence — must be satisfied, a mistake need only be genuine to exculpate the defendant. In the case of a crime involving negligence on the other hand, a mistake must also be reasonable to exculpate. The argument is that serious crimes require *mens rea* to be established because it is unjust to convict someone whose actions were not culpable, and *mens rea* is the hallmark of culpability. But *mens rea* and negligence are seen to be mutually exclusive concepts. Consequently, culpability is seen only to inhere in a conscious intention to do the prohibited act.

It is appropriate at this point to consider the 'defence' of mistake in some detail. O'Connor and Fairall in their work on criminal defences have pointed out that

mistake or ignorance with respect to matters of fact (as opposed to law) may excuse when it tends to show that the defendant lacked the *mens rea* of the offence charged. However, the relevance of mistake goes beyond providing grounds for a denial of *mens rea* (in the narrow sense of the particular mental ingredients) . . . [it] may also exclude *mens rea* in the wider sense of moral culpability. . . . As Stephen J. remarked in *Tolson*, a man 'is deemed to have acted under that state of affairs which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence'. This defence is of general application at common law, and, unless expressly or impliedly excluded by a statutory provision, may be pleaded as a defence to statutory crime . . .⁴¹

Gillies makes the same point when he states that mistake of fact is relevant at two levels. He characterizes these two types of mistake as (1) a mistake of fact going to *mens rea*, and (2) mistake as an independent defence.⁴² This second type of mistake would fall within Williams' definition of a true defence,⁴³ that is, it would amount to a reasonable belief which operated to *excuse* a person from liability. Indeed, Gillies says of this defence that because it 'represents a concession to the defendant, the courts have required that the mistake in question be a reasonable one, that is, the facts must be scrutinized by reference to both subjective and objective tests.'⁴⁴ Howard has observed that mistake, 'in the form

⁴¹ O'Connor, D. and Fairall, P., *Criminal Defences* (1st ed. 1984) 40.

⁴² Gillies, P., *Criminal Law* (2nd ed. 1990) 285.

⁴³ *Supra* n. 39.

⁴⁴ Gillies, P., *op. cit.* n. 42, 285-6.

of an affirmative defence of reasonable mistake of fact is of considerable and growing significance in the criminal law'.⁴⁵

It is clear then, that mistake is here said to operate in two separate ways. However, this theoretical distinction is difficult to substantiate. In the first sense of mistake, culpability is said to be avoided because the mental element necessary for a crime is not present. In the second sense of mistake, culpability is said to be avoided because there is no culpable mental attitude notwithstanding the fact that the formalistic requirements of *mens rea* might be met and the defendant said to be guilty. As Gillies puts it, 'It operates to excuse from liability the person who is technically guilty'.⁴⁶ In the second sense then, the term '*mens rea*' refers to a formal requirement of a definition of a particular crime which might or might not accord with an irresponsible or culpable mental attitude. In these circumstances one can envisage a situation in which the formal, allegedly immutable requirements of a particular crime demand a finding of guilt on the part of the defendant notwithstanding that the general defence of mistake, if available, would have indicated a finding of guilt was not appropriate. Yet both findings could be said to rely on the meaning of *mens rea* (that is, criminal mind). Of course, difficulty only arises if in the first sense of mistake (where the *mens rea* was never present) — as opposed to the second (where it may be) — the mistake itself is not required to be reasonable. But since the decision in *Morgan*, which effectively makes *mens rea* in this sense a term which does not comprehend negligence, such difficulty is inescapable. For the moment it is enough to identify the difficulty such an artificial use of the terminology creates for a coherent system of criminal justice. I consider the formalistic manipulation of terms such as '*mens rea*' below.

It might be argued in response to my line of reasoning, that in *Beckford v. R.*⁴⁷ the Privy Council substantiated, to some extent at least, the orthodox position in relation to mistake. This was a murder case in which the *Morgan* decision was said to be carried to its 'logical conclusion'.⁴⁸ It was held that as far as the particular defence of 'self defence' was concerned, the accused was entitled to rely on an honest belief that he was about to be attacked, even if that belief was unreasonable. The decision is founded on the view that there is a real difference between the definitional elements of an offence (in this case, assault) and elements of a defence (in this case, mistake). Further, it suggests that if a particular mental state of an accused forms part of the definition of an offence a subjective test is warranted whereas a mental state belonging to a defence requires an objective test.⁴⁹

There are four points to be made in relation to this decision and its ramifications for the operation of the doctrine of mistake. First, *Beckford* deals with the

⁴⁵ Howard, C., *Criminal Law* (4th ed. 1982) 499.

⁴⁶ Gillies, P., *op. cit.* n. 42, 285.

⁴⁷ [1987] 3 W.L.R. 611.

⁴⁸ *Ibid.* 618.

⁴⁹ For a fuller analysis of the *Beckford* reasoning see Yeo, S., 'The Element of Belief in Self-Defence' (1989) 12 *Sydney Law Review* 132, 133-6; and Alldridge, P., 'Mistake in Criminal Law — Subjectivism Reasserted in the Court of Appeal' (1984) 35 *Northern Ireland Legal Quarterly* 263, 265.

offence of murder and with self-defence but not with the contentious problem of the nature of the *mens rea* element for the offence of rape. The case does not address perhaps the most central of the concerns of this article, that is, the ambiguous nature of the formal definition of rape. It therefore says nothing helpful about the roles of mistake and *mens rea* in establishing the crime of rape.

Second, the Australian High Court in *Zecevic v. D.P.P.*⁵⁰ has stated that, in respect of offences of violence, an accused's belief that he or she is about to be attacked must be honest *and* reasonable in order for it to form the basis of self-defence. Thus, while the High Court shared the Privy Council's view that there is a real difference between the definitional elements of an offence and the defence elements,⁵¹ it clearly did not share the view that an accused's mistaken belief should necessarily negate an element of the offence.

This fact gives rise to my third point which is that the division between the offence elements and the defence elements is itself inherently problematic, being essentially dependent on a value judgment. Stanley Yeo makes this very clear in his discussion of the elements of belief in self defence:

Which side of the division a particular subject matter should fall depends ultimately on value judgments of the community. Let us take as our subject matter a mistaken belief by a person that he is about to be attacked which prompts him into using force against his putative assailant. Whether that belief should be seen as part of the offence of assault . . . or as part of self-defence depends on the value judgments operating in such a situation. Assigning the belief to the offence implies that the law considers that force mistakenly applied is, in law, no harm at all. Assigning it to the defence side implies that all use of force is, in law, harm but that its use is excused in this case due to the accused's mistaken belief.⁵²

By analogy, in the law of rape the judgment has been made that harm 'mistakenly' inflicted is no harm at all, and no rape has occurred. The fourth and crucial point for the purposes of this article, however, is that it is clearly not legitimate to argue, as Lord Hailsham effectively does in *Morgan*, that an accused's mistake of fact will necessarily go to the question whether the elements of the offence are present, rather than to the question whether the elements of the defence are present in the case of a serious crime. The question whether a mistake of fact need be reasonable to exculpate is fundamentally one of legal principle and not one of formal definition.

My general contention that two separate theoretical levels of mistake are difficult to sustain is supported by the fact that until the decision in *Morgan* the courts were not inclined to make such a distinction; the decision in *Tolson* was authority for the general proposition that mistakes of fact must be honest *and* reasonable.⁵³ However, the trend against *Tolson* which culminates in the decisions in *Morgan* and *Beckford* is justified, for example by Howard, on the ground that it is objectionable to support what *had* been the authoritative position in relation to mistake and *mens rea* in the light of the generally accepted moral premises of the criminal justice system:

⁵⁰ (1987) 162 C.L.R. 645.

⁵¹ See Stanley Yeo's analysis of *Zecevic* in Yeo, S., *op. cit.* n. 49, 139.

⁵² *Ibid.* 140-1, footnotes omitted. Mr Yeo notes he relied heavily on Campbell, R., 'Offence and Defence' in Dennis, I. H. (ed.), *Criminal Law and Justice* (1987) 73ff. for this analysis of principle.

⁵³ *Ibid.* 133-4.

It is indeed not immediately obvious how a principle of criminal responsibility can be justified which concedes that D was not aware of the risk of harm which he was creating but nevertheless authorizes his punishment for creating it.⁵⁴

Echoes of this sentiment are to be found in both O'Connor's and Fairall's⁵⁵ and Gillies'⁵⁶ works. These arguments are analogous to those made by Lord Hailsham in *Morgan*.⁵⁷ They are premised on the general assumption that there is a principle of criminal justice which provides that *mens rea* may not be satisfied by a negligent mental attitude and on the specific assumption that culpability for rape may not inhere in negligence. The argument is that culpability is present *only* in conjunction with actual awareness of specific facts and not in a failure to make reasonable enquiry to ascertain the factual situation as a precaution against injuring others.

The possibility that a negligent mental attitude may satisfy the *mens rea* requirements of a crime such as rape may be found in existing principles of criminal justice which require that the interests of the alleged offender be balanced against the interests of the community. As Fletcher points out,⁵⁸ the goal of justly distributing sanctions is one of assessing whether each alleged offender is sufficiently culpable to forfeit his or her freedom from sanctions. Culpability is not a matter of intending or not intending, but a question of degree:

And the degree of culpability is gauged by the actor's interaction with his victim and the relative dependence or independence from the surrounding environment. The isolation of conduct from the surrounding circumstances makes it more difficult to comprehend the culpability of inadvertance. What makes inadvertant conduct culpable is the failure to respond to circumstances that ordinarily trigger our sensibilities. . . . If a druggist fills a prescription and fails to notice that she is using a poison instead of the proper chemical, she is culpable for not being more attentive under circumstances in which she knows she ought to be careful. On the other hand there is no culpability for ignorance where the circumstances fail to put the actor on notice of the relevant risk.⁵⁹

Given that the criminal justice system seeks to balance the legitimate interests of the accused and the victim, culpability cannot be solely a function of the accused's intentions — particularly when the activity in question amounts to a violation of bodily integrity. The criminal law, by its proscriptive nature, emphasizes objective social standards of behaviour. This would suggest that in fields of consensual relations, or of unavoidable relationship, the *circumstances* surrounding intentions, and the beliefs and knowledge underlying intention, should be considered as part of the culpability equation. The analytical concept of *mens rea* provides a useful way of talking about the criminal justice system's requirements of voluntariness and culpable mental attitude, but it should not be used in a reductivist fashion to arrive at some rough and ready guide to culpability.

(ii) *The nature of mens rea will vary according to the nature of particular crimes*

The second of the issues raised by Lord Hailsham's argument may be seen to

⁵⁴ Howard, C., *op. cit.* n. 45, 361.

⁵⁵ O'Connor, D. and Fairall, P., *op. cit.* n. 41, 41-2.

⁵⁶ Gillies, P., *op. cit.* n. 42, 286.

⁵⁷ E.g. Howard, C., *op. cit.* n. 45, 151.

⁵⁸ Fletcher, G. P., *op. cit.* n. 2, 434.

⁵⁹ Fletcher, G. P., *Rethinking the Criminal Law* (1978) 711-2.

flow directly from the first. The terms '*mens rea*', '*actus reus*', and 'mistake' are used by Smith and Hogan, for example, to arrive at conclusions which are only sustainable if the terms themselves are taken to have clearly-defined and circumscribed meanings. A. T. H. Smith, however, has suggested that:

Analysis of crime in terms of *actus reus* and *mens rea*, and the mechanical application of statutes, tends to obscure the principles of harm and illegality on which criminal liability is based.⁶⁰

Wells, arguing along similar lines, has added that defences such as insanity, provocation, duress and necessity do not fit within the paradigm view of *mens rea*, but serve as examples of the operation of a wider fault principle.⁶¹ One thing at least is clear, *mens rea* means different things in different contexts and this suggests that to say '*actus reus* plus *mens rea* equals criminal behaviour' is not really to have said anything illuminating about the nature of the elements of criminality. *Mens rea* or the mental element refers to a culpable mental attitude in the abstract and only takes on a concrete form in relation to specific crimes. As A. T. H. Smith notes, it is as aids to exposition that the terms *actus reus* and *mens rea* have their primary justification. He warns that 'we should constantly be on our guard against allowing theory to grow on the back of definition'.⁶² While it is inevitable that the positivist aspects of any workable system of rules will tend to push the principles which generated them into the background, this does not mean that the principles themselves should become less important. In this case it should be recognized that Lord Hailsham's formalistic account of *mens rea* and mistake has departed from the principle of criminal justice truly based on principles of culpability. The subjectivist position is not premised on individual *culpability*, but on a faulty generalization relating to the nature of the 'guilty mind', a generalization which sees the *legal* concept of 'guilty mind' and the layperson's concept of guilty conscience as virtually interchangeable and which enshrines attitudes more sympathetic to individualistic rights of the offender than to the rights of the community of potential victims. The subjectivist simply fails to acknowledge that the essentially liberal orientation of the criminal law does *not* make for a criminal justice system which seeks only to protect the individual, and individualism. In its concern to implement public standards of behaviour, the system clearly represents an attempt to balance certain rights: the right to be protected from crime and the right to be protected from false conviction.⁶³

Subjectivists such as Lord Hailsham are appealing to what they regard as general liberal principles of autonomy and respect for the individual. But in fact, their position is at odds with even the most conventional of liberal attitudes in not acknowledging the social limits of personal freedom. While there is no room here for a detailed consideration of the nature of liberalism as such, it is

⁶⁰ Smith, A. T. H. 'On Actus Reus and Mens Rea' in Glazebrook, P. R. (ed.), *Reshaping the Criminal Law* (1978) 95, 100.

⁶¹ Wells, C., 'Swatting the Subjectivist Bug' [1982] *Criminal Law Review* 209, 209.

⁶² Smith, A. T. H., *op. cit.* n. 60, 107.

⁶³ Nicola Lacey examines the individualist basis of classical legal liberalism and points out that liberal writers such as Rawls and Dworkin undermine the argument that liberalism does not acknowledge the importance of human social existence and the social determination of human nature. See Lacey, N., 'Punishment and the Liberal World' (1987) 11 *Bulletin of the Australian Society of Legal Philosophy* 70, 71-3.

important to note that J. S. Mill, one of the most influential of classical liberal writers, clearly recognized that individuals should not be elevated above their rights as citizens. In his essay *On Liberty*, Mill sets out his view of the proper limits to the authority of society over the individual: a view which places great importance on individual autonomy. But he also makes the unequivocal point that

every one who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct toward the rest.⁶⁴

Subjectivism misses the point entirely in failing to acknowledge the role of public welfare in classical liberalism, a role which is highlighted even in the libertarian writings of Mill. He writes:

As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion.⁶⁵

Legal sanctions apply to those who are *culpable enough* to satisfy the *mens rea* requirement of a particular crime. Intention to commit the crime will always be enough but culpability based on inadvertence will also often be enough where a failure to act carefully in a social situation is considered unreasonable by society (or, in the case of a criminal trial, by the trier of fact).⁶⁶ The formal requirements of the criminal system should not be seen as justifying reductivist and potentially unjust processes.

4. SHOULD MENS REA INCLUDE NEGLIGENCE?

Lord Hailsham's formalistic account of *mens rea* and mistake tends to obscure his departure from a conception of criminal justice truly based on culpability. In previous sections of this article I have argued that the essential basis of this departure is an unwillingness to concede that negligence might satisfy the *mens rea* requirement of a serious crime such as rape. It is argued by those who support Lord Hailsham's rationale that negligence is not a legitimate form of *mens rea* for serious crimes because of the possibility of creating serious offences which make no reference to the intentions of the accused. It is said that this supposedly anti-individualistic stance amounts to a travesty of criminal justice because a failure to meet objective standards or to do certain things might automatically result in a serious criminal offence being committed — notwithstanding the most benign intentions on the part of the defendant. However, objectivism does not amount to anti-individualism. A *mens rea* test with an objective component (which is what objectivism actually amounts to) should be distinguished from anti-individualism. The remainder of this section will examine why it is that a culpability-based criminal justice system requires that *mens rea* be satisfied by gross negligence.

⁶⁴ Mill, J. S., *Three Essays* (1981) 92.

⁶⁵ *Ibid.* 92-3.

⁶⁶ See *supra* n. 58.

Hart makes the important point in an essay supporting the inclusion of negligence as an aspect of *mens rea* that:

The word 'negligently', both in legal and in non-legal contexts, makes an essential reference to an omission to do what is . . . required: it is not a flatly descriptive psychological expression like 'his mind was a blank'.⁶⁷

This passage makes two fundamental points about the concept of criminal negligence. First, that negligence does not presuppose an absence of any relevant mental attitude. Rather, it simply denotes a failure on the defendant's part to direct his or her mind to the possibilities of danger or harm to others. Second, that the failure to consider harmful possibilities is culpable because it is *unreasonable* not to consider such harmful possibilities. In this specifically legal context, the term 'unreasonable' implies a failure to observe certain social obligations. Given that a competent person is legally responsible for his or her own actions, he or she is considered to be acting unreasonably in determining to act in a manner which falls short of a public standard of conduct in a particular situation. While the extent of personal responsibility for one's actions, and the nature of public standards of conduct may vary, such judgments and their consequent ordering of public behaviour are essential for *social* existence. In the law of torts, the general concepts of 'negligence' and 'the reasonable person' have developed as a response to changes to perceptions of socially acceptable behaviour. Decisions such as *Donoghue v. Stevenson*⁶⁸ and *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd*⁶⁹ demonstrate a relatively modern, expansive approach to the nature of social duties owed by the individual to the community and reflect evolving community demands in relation to social responsibility.

The important points to acknowledge at this stage then are (1) that negligence is *not* premised on a harmless inadvertence on the part of the defendant but on a perceived culpable mental attitude; and (2) that although negligence makes reference to an objective standard of care, it does not make any given action culpable *per se*. Particular actions are *only* culpable when they are the consequence of a culpable (that is, negligent) mental attitude. Hart makes the point that we would want to distinguish the case of an irresponsible child or lunatic from the case of a negligent signalman whose duty is to signal a train if the evidence clearly shows that the signalman has the normal capacities of memory and observation and intelligence. As Hart says:

He may say after the disaster, 'Yes, I went off to play a game of cards. I just didn't stop to think about the 10.15 when I was asked to play'. Why, in such a case, should we say 'He could not help it — because his mind was blank as to the consequences'?⁷⁰

The point here is that the signalman *could* help it, and he *did* possess a mental attitude which was culpable — precisely because he did not bother to consider the possible harmful consequences of his actions.

It is clear then that the simple dichotomy suggested by Lord Hailsham in *Morgan*, between culpable intention and non-culpable inadvertence, represents neither the state of the law nor the options available to it.

⁶⁷ Hart, H. L. A., *Punishment and Responsibility op. cit.* n. 2, 148.

⁶⁸ [1932] A.C. 562.

⁶⁹ [1964] A.C. 465.

⁷⁰ Hart, H. L. A. *op. cit.* n. 2, 150.

Wall, an American academic and supporter of Lord Hailsham's decision in *Morgan*, provides an instructive example of the inadequacy of the latter's reasoning in relation to negligence. Wall feels obliged to make his apologia for *Morgan* because he realizes that if an honest belief in consent on the part of the defendant will negate the requisite criminal intent for rape, then one might infer that someone can find legal excuses to commit a sexually violent act against a non-consenting adult. Wall says:

Let us consider the defendants' mental states at the time the woman in question [Daphne Morgan] was raped. What evidence of consent was there? Interestingly enough, *there was no reliable evidence*. The only clue as to an expression of consent on behalf of the woman was put forward by the husband. Should we allow into the consideration of this woman's possible rape the husband's claims or beliefs? An affirmative response would allow for an *illegitimate transfer of consent*. *The husband cannot rightly grant consent to the defendants on behalf of his wife. . . . In short, the defendants clearly had no valid reason to conclude that the woman consented to intercourse . . .* (emphasis added).⁷¹

The point is, of course, that *Morgan*, if it stands for anything, stands for the proposition that genuine belief in the woman's consent, *regardless of its reasonableness*, will negate the *mens rea* for rape. Wall, puts his finger on the real problem with *Morgan* when he realizes that it is 'illegitimate' (that is, unreasonable) for the rapists in *Morgan* to base their beliefs in the woman's consent on the husband's extraordinary assurances alone. On this basis however, he manages to conclude *not* that it is illegitimate to have a sweeping 'honest and genuine belief' defence to rape but, instead, that in a case like this it is appropriate to withhold the possibility of the defence from the jury. There are two possible rationales for the conclusion Wall reaches. First, he might be suggesting that the jury could not possibly find a *legitimate* belief on the part of the defendants that the woman was consenting, or second, he might be suggesting that the jury could not, on the facts as presented, have found a *genuine* belief in the defendants that the woman was consenting. Clearly, if Wall's is the first argument, it subverts the central finding of the majority in *Morgan* and his own argument to this point.⁷² Given this, Wall must intend the second argument, although his use of terminology such as 'legitimate' and 'valid' tends to expose the weaknesses of the subjectivist position despite his best efforts to the contrary.

Wall's analysis represents an outline of the decision in *Morgan* in as much as the House of Lords ultimately disallowed the appeal from the Court of Appeal. This was so, however, notwithstanding that they upheld the validity of the 'honest and genuine belief' defence to a charge of rape.⁷³ The decision in

⁷¹ Wall, E., 'Mens Rea and Rape' (1986) 50 *Journal of Criminal Law* 388, 392.

⁷² Certain U.S. states, however, have taken up this particular line of reasoning. As Martha Chamallas points out, some states in taking this approach

have tried to rehabilitate the concept of consent by defining consent from the victim's standpoint. Wisconsin for example, has narrowed the definition of consent to include only those overt acts or words of the victim indicating freely given consent. Under such a standard, a man is subject to criminal prosecution if he has sexual intercourse with a passive woman without first securing her express consent. Additionally, Illinois has demonstrated more trust in the credibility and reliability of rape complainants by shifting the burden of production to the defendant to present some evidence of consent before the issue is interjected into the criminal prosecution.

See Chamallas, M., 'Consent, Equality and the Legal Control of Sexual Conduct' (1988) 61 *Southern California Law Review* 777, 800.

⁷³ E.g. Lord Cross' conclusion in *Morgan* [1976] A.C. 182, 204.

Morgan has been confirmed in this respect in the case of *R. v. Taylor*⁷⁴ where Lord Lane C.J., who delivered the opinion of the court, said:

It should be plainly understood at the outset that there is no general requirement that such a direction [that the defence of honest and genuine belief is open in a charge of rape] should be given in all cases of rape. The nature of the evidence and of course particularly the evidence given by the complainant and the defendant will determine whether or not such a direction would be fair. There must be room for mistake in the case before such a direction is required.⁷⁵

The difficulty with this approach is that it requires the judge to pre-judge the issues and decide whether it was possible that the jury could legitimately find that the defendant genuinely believed the woman was consenting. Clearly, this involves an assumption that certain actions will *not* legitimately ground the defendant's belief in consent, and if this is the case it follows that there is no longer a rule that a genuine belief in consent will necessarily be a defence to a charge of rape. Rather, the rule is now that the belief must be genuine *and* legitimate, which is essentially the 'honest and reasonable' objectivist requirement in a different form. Clearly, the incoherence of the reasoning of the majority in *Morgan*, even in its own formalistic terms, presents insurmountable difficulties for those who support the subjectivist position and who consequently maintain that negligence will not satisfy the *mens rea* requirement for rape.

A partial rebuttal of these conclusions is suggested by the argument that the *Morgan* formulation of *mens rea* is necessarily adequate because it has resulted in convictions in precisely those cases which initially seem to throw up problems: *Morgan*, *Pappajohn*,⁷⁶ and *Taylor*.⁷⁷ The contention is that although recklessness (which is undoubtedly an aspect of *mens rea*) in the case of rape requires consciousness on the part of the defendant of the possibility of non-consent in the woman, it does not provide a 'rapist's charter' because, in practice, if the man's alleged beliefs in relation to consent were unreasonable a jury would never find that he actually held them. Thus, while the restriction of *mens rea* to recklessness and not negligence is implicitly acknowledged to be unsustainable at a theoretical level, it is said to be, practically speaking, satisfactory and congruent with the orthodoxy (*per* Lord Hailsham) on rape.⁷⁸ However, this merely amounts to a form of the expedient argument that the end justifies the means.

Furthermore, there is undeniably a problem with the very existence of unjust laws, and not merely in terms of formal incoherence or conflict with the underlying principles of criminal justice. Law reform is of general social importance. For example, because of the traditionally sexist orientation of rape laws (particularly given the decision in *Morgan*), some commentators argue that rape law reform is necessary to symbolize changes in social attitudes towards the victim, the offender, and the offence of rape. It is suggested that the law amounts to a statement of policy of the community on how women are regarded and that

⁷⁴ (1985) 80 Cr.App.R. 327.

⁷⁵ *Ibid.* 330-1. The Canadian case of *Pappajohn* [1980] 2 S.C.R. 120 (*supra* nn. 4, 39) provides another example of the evidential discretion which *Morgan* has apparently spawned.

⁷⁶ *Ibid.*

⁷⁷ *Supra* n. 74.

⁷⁸ See, e.g. Goode, M. R., 'Mens Rea in Corpore Reo: An Exploration of the Rapist's Charter' (1983) 7 *Dalhousie Law Journal* 447.

when the law is reviewed this policy may accompany, or even help to create, changes in social attitudes to women and the behaviour of men and women.⁷⁹

It has traditionally been accepted that, in relation to the legitimacy of a legal system, it is not simply what the law substantively provides that matters, but also (and perhaps even more importantly) what it is seen to provide. This argument, which is fundamental to the institution of open courts, is no less appropriate when applied to the public form of the law. In considering the importance of comprehensive law reform in relation to sexual violence it is important to note that the form of the law can embody powerful images of the nature of acceptable sexual behaviour.⁸⁰ A particularly succinct articulation of the relationship between public statements of legal policy and community standards in the area of sexual conduct is provided by Chamallas:

Despite its intimate character, sexual conduct is highly regulated activity. At any given point, the picture that emerges of the complex web of legal regulation is impressionistic, and some features are difficult to discern. The law of sex, however, can operate as a value generating force when those who create or are governed by it perceive in the law an underlying vision of appropriate sexual conduct.⁸¹

It is surely not acceptable to condone the development of common law precedents of potentially general influence when those precedents are themselves founded on an uncritical acceptance of a particular line of judicial authority and when they tend to promote, in their turn, a disregard for coherence in the law. The orthodox view is that the decision in *Morgan* is authoritative. This is despite the fact that it actually represents a theoretical position not easily reconciled with fundamental considerations of culpability in the criminal law. However, in the struggle to reconcile the *Morgan* decision with notions of criminal culpability and thereby deny negligence a role as an aspect of *mens rea*, advocates of the subjectivist theory have had no alternative but to effectively put their faith in the 'common sense' of the jury or the judge to compensate for the implicitly acknowledged inconsistencies and inadequacies of the legal *status quo* they seek to maintain.

Further evidence of the inadequacy of the reasoning behind the *Morgan* decision is to be found in the more recent English judicial developments in the law relating to mistake and criminal recklessness. The English Court of Appeal decision in *R. v. Pheko*,⁸³ a harassment case, reasserted the objectivist mistake test outlined in *Tolson*,⁸⁴ thereby restricting the relevance of *Morgan* to rape. Hollings J. held that although the majority in *Morgan* decided that in the case of rape the Crown must disprove an actual belief however unreasonable it appeared, *Morgan* was confined and intended to be confined to the offence of rape.⁸⁵

⁷⁹ E.g. Barrington, R., 'The Rape Law Reform Process in New Zealand' (1984) 8 *Criminal Law Journal* 307, 323.

⁸⁰ Mary Coombes considers this issue in some detail in 'Crime in the Stacks or, A Tale of a Text: A Feminist Response to a Criminal Law Text' (1988) 38 *Journal of Legal Education* 117, 135.

⁸¹ Chamallas, M., *op. cit.* n. 72, 777.

⁸² There is, however, some empirical evidence to support these claims. See for example, Burt, M. R., 'Justifying Personal Violence: A Comparison of Rapists and the General Public' (1983) *Victimology* 131; and Tetreault, S., 'Attitudes of Rapists and Other Violent Offenders Towards Women' (1987) *Journal of Social Psychology* 375.

⁸³ [1981] 3 All E.R. 84.

⁸⁴ *Supra* n. 30.

⁸⁵ *Pheko supra* n. 83, 93.

Hollings J. also made the point, however, that the reintroduction of an objective aspect to the defence of mistake in this case was *not* to be justified on the basis that the appeal involved the consideration of a merely quasi-criminal offence, namely, an offence under the Protection from Eviction Act 1977 (U.K.). In response to the Crown's case that the Act was merely an adjunct to 'social legislation' relating to the protection of tenants, Holdings J. stated:

We cannot take that view. Not only are substantial penal consequences provided for . . . but also conviction for such an offence must in our view be considered as a conviction for a truly criminal offence and as attaching serious stigma to the offender.⁸⁶

This case effectively represents a post-*Morgan* acknowledgment that a negligent mental attitude may satisfy the *mens rea* requirement of a criminal offence, and a recognition that the *Morgan* decision illegitimately broadens the scope of the mistake defence in all crimes involving a mental element (apart from rape).

In a separate but related development, the two English decisions of *Commissioner of Police of the Metropolis v. Caldwell*⁸⁷ and *R. v. Lawrence*⁸⁸ (not, themselves, rape cases) reinterpreted the general test for recklessness. In these cases it was held that recklessness did not require an *awareness* of the risk of non-consent provided that an ordinary prudent person would have appreciated the risk that the complainant was not consenting. These decisions implicitly suggest that, in the case of rape, an accused may not be able to simply rely on an honest and genuine mistake to avoid liability. This suggestion was taken up in *R. v. Pigg*,⁸⁹ a decision which was subsequently reversed on appeal. However, in the more recent cases of *R. v. Mohammed Bashir*,⁹⁰ *Satram and Kewal*,⁹¹ and *Beckford v. R.*,⁹² the courts have significantly restricted the *Pigg* test (which applied the *Caldwell/Lawrence* reasoning). In *Mohammed Bashir* the main point on appeal was the interpretation of the *Caldwell/Lawrence* rule. It was held that an 'obvious risk' was not what would be apparent to an ordinary reasonable person, but to the defendant, had he stopped to think. This is effectively the end point of a concerted judicial movement away from a general application of *Morgan* in the area of criminal recklessness.

In keeping with the current state of Australian case law on the subject, the Victorian Law Reform Commission in 1986 rejected the introduction of negligence as an aspect of *mens rea*⁹³ and also strongly rejected the developments in the law on recklessness under English law in *Caldwell*, *Lawrence* and *Pigg*. As far as the Australian common law position on recklessness is concerned, the test is a subjective one as *R. v. Crabbe*,⁹⁴ *Boughey v. R.*⁹⁵ and *Macpherson v. Brown*⁹⁶ make clear.

⁸⁶ *Ibid.* 92.

⁸⁷ [1982] A.C. 341.

⁸⁸ [1982] A.C. 510.

⁸⁹ [1982] 2 All E.R. 591.

⁹⁰ [1982] Crim.L.R. 687.

⁹¹ (1984) 78 Cr.App.R. 149.

⁹² [1987] 3 All E.R. 425.

⁹³ *Rape and Allied Offences: Substantive Aspects*, Discussion Paper No. 2, August 1986, Law Reform Commission of Victoria, 35.

⁹⁴ (1985) 156 C.L.R. 464.

⁹⁵ (1986) 161 C.L.R. 10.

⁹⁶ (1975) 12 S.A.S.R. 184.

However, the point to be drawn from the English experience is that where negligence is prevented from functioning as an aspect of *mens rea* the law is unable to deal with cases which involve a defendant's culpable omission to consider the possible harmful consequences of his own actions. Faced with just such a situation, the courts responded by manipulating doctrines such as recklessness in order to achieve just outcomes, a practice which tended to result in incoherent legal doctrines. In this case, recklessness, which clearly refers to a different type of culpable action from negligence, is manipulated in order to fill the gaps which result from the exclusion of negligence as an aspect of *mens rea*. Ironically (given the subjectivist sympathy for legal formalism), formal coherence is sacrificed in subjectivist efforts to reconcile support for the orthodoxy *per Morgan* and the desire to produce substantively just outcomes. However, the subjectivist concern to preclude negligence as a basis of liability for serious crimes rests on a failure to perceive *culpability*, rather than conscious or 'evil'⁹⁷ intent, as the true basis of criminality.

5. CONCLUSION: OBJECTIVISM VERSUS ANTI-INDIVIDUALISM

Subjectivists argue that objectivism essentially amounts to the rejection of the central tenet of liberal philosophy: the importance of the individual. The argument is that objectivism necessarily posits a strict rule imposing responsibility for causing harm regardless of the actor's mental condition or any other mitigating circumstances of a subjective kind. This is simply not the case. Although on the objectivist analysis, inadvertently invasive action will sometimes be culpable, it is not always so. Culpability depends upon volitional action. Far from proscribing particular actions and abolishing any reference to mental attitude, the objectivist argument posits a *mens rea* test with an objective component. The objective issue of whether or not the accused has behaved unreasonably does not displace defences of insanity or duress or any other mitigating circumstance which may make the action non-voluntary and therefore non-culpable. The point is that culpable inadvertence is a form of *mens rea*. To insist on an objective component of *mens rea* is merely to insist that the law assess defendants as individuals with social responsibilities.

The argument for objectivism, then, does not seek in any way to marginalize the role of *mens rea* in the criminal law. Rather, it posits that in a criminal justice system based on culpability, *mens rea* may be satisfied (in the crime of rape at least) by negligence.

In *Morgan*, the defendants claimed they were entitled to decide that a direct 'no' from the victim meant 'yes'. Further, the majority judgment in *Morgan* suggests that the law should endorse this sort of unreasonable decision because to do otherwise would be to jeopardize the criminal law's proper concern for the accused as an individual. These suggestions are misconceived. The majority's subjectivist appeal to inconclusive authority is completely inadequate. Furthermore, their failure to fully appreciate the nature of criminal culpability and the

⁹⁷ *Supra* n. 20.

social orientation of the liberal criminal justice system results in a decision which does not properly balance the interests of the victim and the accused. The majority judgment in *Morgan* fails to appreciate that culpability in the case of rape, and consequent notions of criminality, should not be a function only of the accused's motivation, but also of his failure to observe the standards of social behaviour that communities are entitled to expect and demand from their members.