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ARTICLES

BAD ACTS IN SEARCH OF A MENS REA: ANATOMY OF A RAPE

Robin Charlow[*]

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INTRODUCTION

At 4:30 a.m. on October 15, 1982, John Henry Sansregret broke into the home of his former girlfriend and terrorized her for the second time in less than a month.[1] He tore the telephone from the wall to prevent her from calling for help and threatened her with a butcher

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1. Sansregret v. The Queen, [1985] 1 S.C.R. 570, 572-73 (Can.). As this citation indicates, the name "Sansregret" is not fictional, though, given the facts, it might seem so.

knife.[2] While he repaired a window to conceal his entry, he ordered her to undress and stand in the doorway so that she could not escape.[3] He tied her hands behind her back, struck her on the mouth so hard that she bled, and rammed the knife blade several times into the wall very close to her, announcing that if he had found her with a boyfriend he would have killed them both.[4] In fear for her life, she calmed him as she had on the previous occasion, by pretending that they might reconcile and by having sexual intercourse with him.[5] As before, she reported the incident to the authorities as soon as she was safely able, claiming she had been raped.[6]

But had she been raped? At a colloquial level, the question seems preposterous. No one in their right mind could have imagined that she was truly consenting to intercourse under the circumstances.[7] Indeed, she asserted that she "didn't consent at any time,"[8] and every one of the judges who heard the case concluded that she had not freely or genuinely consented. Surely this is rape. But in the complicated world of criminal mens rea, the question is not outrageous and the answer is not so clear. In fact, the trial court found that Sansregret had not raped his ex-girlfriend, and there were three separate opinions and rationales in the Court of Appeal, only two of them concluding that there had been a rape.[9] The Supreme Court of Canada confirmed that the defendant was guilty of rape, but only by invoking for the first time in the case, and in a somewhat questionable way, the doctrine of willful blindness.[10]

The law of rape has changed in Canada since the incident involving Sansregret.[11] It has also changed in significant respects in many other common-law countries and, over the past twenty years or so, in most jurisdictions the United States as well, including with respect to mens rea.[12] Yet, despite the widespread reform of rape law, the *Sansregret*

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2. *Id.* at 573.
3. *Id.*
4. *Id.*
5. *Id.* at 572-73.
6. *Id.* at 572, 574.
7. R. v. Sansregret, [1983] 22 Man. R.2d 115, 118 (Can.) ("No rational person, hearing that conversation, having witnessed what preceeded [sic] it, witnessing the knife in the accused's hand, could possibly have believed that the complainant's responses were genuine and were induced by anything other than fear.").
8. *Sansregret*, 1 S.C.R. at 573.
9. *Sansregret*, 22 Man. R.2d 115 (trial court); R. v. Sansregret, [1983] 25 Man. R.2d 123 (Can.) (Court of Appeal).
10. *Sansregret*, 1 S.C.R. at 583-88; *see* discussion *infra* Part I.E.2.
11. *Sansregret*, 1. S.C.R. at 572 (noting that the applicable section of the Canadian Criminal Code had been repealed and significant changes made in this area of the law while the case was on appeal); *see also* Confronting Sexual Assault: A Decade of Legal and Social Change (Julian V. Roberts & Renate M. Mohr eds., 1994); John M. Williams, *Mistake of Fact: The Legacy of* Pappajohn v. The Queen, 63 Can. Bar R. 597, 601 & nn. 6-7 (1985).
12. *See* Joshua Dressler, Understanding Criminal Law § 33.01[B], at 569-70 & n.8

case presents an interesting window into the still confusing and often controversial world of criminal mens rea in general, and willful blindness in particular.

Viewed more broadly, *Sansregret* illustrates a problem that could occur in any case involving a crime that requires for conviction knowledge of some important fact. Knowledge-level crimes include such commonplace occurrences as drug offenses (manufacture, distribution, possession, and importation),[13] fraud (theft by false pretenses,[14] writing a check for insufficient funds,[15] making a false statement to governmental or public authorities[16]), perjury,[17] obstruction of justice,[18] and receipt of stolen property.[19] What makes these cases difficult is that the prosecutor must prove something about the defendant's inner thoughts, that he or she was subjectively aware of the fact in question. Alternatively, a prosecutor may establish guilt of a knowledge-level crime by proving that a defendant was not actually aware of the fact only because he or she deliberately avoided positive knowledge of it, thus invoking the doctrine of willful blindness. However, as in *Sansregret*, there is a third possibility as well. A defendant may be neither subjectively aware of the fact in question nor willfully blind to it, but, at the same time and more importantly, also not morally innocent of the harm contemplated by the criminal prohibition. How should we conceptualize this situation and how should the criminal law respond, perhaps to accommodate conviction?

In the course of exploring these issues, this article reviews some new thoughts on old and new mental states to see what they tell us about criminal culpability generally. It examines the rationale for adoption

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(3d ed. 2001); Susan Estrich, Real Rape 80-91 (1987); Stephen J. Schulhofer, Unwanted Sex: The Culture of Intimidation and the Failure of Law 17-46 (1998); Leigh Bienen, *Rape III – National Developments in Rape Reform Legislation*, 6 Women's Rts. L. Rep. 170 (1980).

13. *See, e.g.*, 21 U.S.C. § 841 (2001) (outlawing knowing manufacture, distribution, and possession with the intent to distribute certain listed controlled substances); *id.* § 844 (1991) (outlawing knowing possession); *id.* §§ 952, 960 (1999 & 2001) (outlawing knowing importation).

14. Dressler, *supra* note 12, § 32.10[C][3], at 567; Wayne R. LaFave, Criminal Law § 8.7(f), at 839 (3d ed. 2000).

15. LaFave, *supra* note 14, § 8.9(b), at 853.

16. *See, e.g.*, 18 U.S.C. § 1001 (2000) (outlawing knowingly making false statements in matters within the federal government's jurisdiction); *see also id.* § 287 (outlawing knowingly presenting a false claim against the United States or any of its departments or agencies).

17. *See, e.g.*, 18 U.S.C. § 1621 (2000) (outlawing willfully making a false statement while under oath to testify truthfully); United States v. Bronston, 453 F.2d 555 (2d Cir. 1971) (holding that 18 U.S.C. § 1621 requires defendant's knowledge of the falsity of his statements), *rev'd on other grounds*, 409 U.S. 352 (1973).

18. *See, e.g.*, United States v. Aguilar, 515 U.S. 593 (1995) (holding that an obstruction of justice violation required knowledge of the proceeding the defendant was alleged to have obstructed).

19. LaFave, *supra* note 14, § 8.10(d), at 858.

of a knowledge requirement for a variety of crimes, including rape, drug offenses, and certain kinds of fraud. It explores the reasons why rape reform has often resulted in reducing this requirement to recklessness, negligence, and even strict liability, and whether this development translates to the other knowledge-level crimes under examination. In addition, it considers a suggestion to alter radically the definition of willful blindness, a construct historically and frequently used to satisfy a knowledge requirement. Also, it delves into proposals to add an additional mental state of "indifference" to the taxonomy of criminal mens rea. These ideas not only enlighten the particular problem raised by *Sansregret*, but also question the efficacy of our traditional conceptions of mental states in defining the proper parameters of criminal responsibility.

The article proceeds in two parts. Part I dissects the opinions in the *Sansregret* case in an attempt to understand and explain the confusion over mental states in the case itself. Interspersed with this explication is an examination of the meaning of mens rea in rape law and of the very varied mens rea of rape in common-law countries, particularly in the United States. I conclude that Sansregret probably did not know nor was willfully blind to the absence of, or coerced nature of, consent from his victim, but that he probably should have been guilty of rape nonetheless.

Part II examines various alternatives that might close this gap between criminal doctrine and our intuitive moral sensibilities. The strange case of John Henry Sansregret seems to teach us as much about the responsibility of a "date rapist,"[20] or an Enron executive who professes to have known nothing of the glaring irregularities surrounding him,[21] as it does about the guilt of Sansregret himself. In the course of this part of the examination, the article delves into recent scholarship on mental states and on the nature of criminal culpability generally. This broader discussion covers essentially all knowledge-level crimes, referring back as well to *Sansregret* and rape.

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20. *Cf.* Dressler, *supra* note 12, § 33.05, at 587 ("With the expansion of rape law to include intercourse secured in the absence of grave force or resistance, particularly in the acquaintance rape context, the issue of mens rea becomes more critical."). For general discussion of the problem of "date rape," see Schulhofer, *supra* note 12, Chap. 12: "Dating: What Counts as Consent?," at 254-73; Estrich, *supra* note 12, at 109, nn. 11-12.

21. *See* Patty Reinert & Tom Fowler, *The Fall of Enron*, Houston Chron., Feb. 15, 2002, at A1 (recounting Enron employee Sherron Watkins' Congressional testimony that "Enron's questionable accounting practices were 'common knowledge'" among senior executives, contradicting testimony of top executive Jeff Skilling, who professed to believe "the company was in good shape when he resigned"); Rone Tempest & Richard Simon, *The Fall of Enron: Enron's Lay Faces Capitol Hill Hot Seat Inquiry*, L.A. Times, Feb. 3, 2002, at A20 (indicating Congress's interest in scheduled testimony of Enron CEO Kenneth Lay as to what he knew, because the public was skeptical that the head of a major corporation, faced with repeated reports containing warning signals, would not have known of irregularities).

Part II first considers reducing the mens rea of knowledge to recklessness, or even negligence, which are easier to prove in many instances. I conclude that it would be unwise to eliminate the mens rea of knowledge generally, as was essentially done in the case of rape. While debatable for some offenses, there are other crimes for which knowledge remains an appropriate culpable mental state.

Next, Part II explores a suggestion to change the meaning of willful blindness, often used as a knowledge substitute. The new construct would cover those, like Sansregret, who "actively" rather than "deliberately" suppress positive knowledge, as these terms are defined in the thesis. I conclude that it would be unwise to alter the definition of willful blindness in an attempt to convict such people. Not only would this further distort a long established and already problematic doctrine, but it would prove futile in its effort to implicate Sansregret, and could actually result in exculpating more seemingly guilty people than it inculpates.

The final section of Part II discusses a proposal to add an entirely new mens rea, "indifference," that could well indict the kinds of offenders in question. I argue that any attempt to fashion an essentially new mens rea to cover bad acts by people who lack the traditional required guilty mind must be considered with an exceptional degree of caution, and any suggestions for a new culpable mental state should be crafted in an exceedingly careful manner. The indifference proposal evaluated seems to fail this test.

As a result, I reluctantly conclude that it might not be feasible to find just the right fix for some of these particular bad acts in search of a mens rea. Every time one plugs a hole in the bucket, it appears only to spring more leaks elsewhere. Rectifying this particular wrong seems to create the potential for more injustice than it resolves.

I. THE PUZZLING MENS REA OF RAPE

A. *What Is Meant by the Mens Rea of Rape*

In order to understand the *Sansregret* case, it might be helpful first to clarify what exactly was in controversy—the mens rea of rape. While rape is defined differently in different jurisdictions, it usually encompasses sexual intercourse without consent accomplished by force or fear.[22] Several relevant mental states may arise in understanding rape. First, the defendant has a mental attitude about his act of having intercourse. In Model Penal Code terms, he purposefully, knowingly, recklessly, or negligently has intercourse.[23]

22. *See* Model Penal Code § 213.1 cmt. 1 (1980); Dressler, *supra* note 12, § 33.01[B], at 570 & n.10; LaFave, *supra* note 14, § 7.18, at 752-53; David P. Bryden, *Redefining Rape,* 3 Buff. Crim. L. Rev. 317, 320-21 (2000).

23. *See* Model Penal Code § 2.02(1) (1962).

Though one could conceive of them, circumstances in which someone accused of rape had intercourse other than purposefully are surely rare, if they exist at all.[24] Thus, while a defendant's mental attitude about his act of having intercourse could be described as part of the mens rea of rape, it is not a particularly relevant mental state.

The mens rea of rape usually refers instead to the defendant's mental attitude toward the element of nonconsent.[25] Thus, what one cares about is whether the defendant, who had intercourse without consent, wanted to have sex without consent, knew he did not have consent, or was reckless or negligent as to whether he had the complainant's consent. When I refer to the mens rea of rape, I mean to refer to whichever of these is required to prove a charge of rape.[26]

The mental attitude of the victim about the act of intercourse may also be relevant in rape cases. If consent is established subjectively—that is, based on the victim's intent to consent—then the victim's state of mind toward the act of intercourse is something else that needs to be proved to establish rape.[27] This mental state is important, but not usually referred to as the mens rea of rape.

B. *Nonconsent and Coerced Consent*

To determine what is the mens rea of rape in a case like *Sansregret,* it is necessary to distinguish between an act of intercourse without

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24. For example, someone might have intercourse knowingly but not purposefully if he was aware that he was having sex but it was not necessarily his aim or desire to do so, perhaps if he was being seduced without caring about the outcome. Such a person is not usually charged with rape. Examples of reckless or negligent acts of intercourse seem even more difficult to envision.

25. Part I.B raises the issue of intercourse with coerced consent rather than nonconsent. Everything that is said here about nonconsent would apply as well to coerced consent situations.

26. In some jurisdictions, it is arguable that none of these culpable mental states is required for a rape conviction. *See infra* note 68 and accompanying text.

27. Theoretically one could ask, "Did she intend to consent, did she know she was consenting, or was she reckless or negligent about consenting?" Because consent is usually thought of as a subjective state, *see* LaFave, *supra* note 14, § 7.21(b), at 784 (indicating that the outcome of a rape accusation often turns on "what the woman's state of mind was at the time of the sex act," which is a fact difficult to resolve after the fact); Nathan Brett, *Sexual Offenses and Consent*, 11 Can. J.L. & Jur. 69 (1998); Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 Yale L.J. 54, 55 (1952), the victim's intent to consent would create consent, and only her intent to consent would create consent. In other words, one could conclude that she could not be reckless or negligent about her consent, because she either affirmatively formed a desire–in her own mind–to consent, in which case she consented, or she did not form such a desire, in which case she did not consent. A woman could conceivably be confused, even in her own mind, about whether she was consenting, and perhaps this could be seen to render her reckless or negligent about her own consent, but this is a confusing notion. Alternatively, we could use an objective standard to determine the existence of consent, so that consent would depend on any observable evidence that could be construed as a grant of permission for the acts involved. Brett, *supra.*

consent (which I have been calling "nonconsent") and an act of intercourse with consent that was coerced by the use, threat or fear of force (which I am calling "coerced consent"). In most, if not all, jurisdictions, either one will suffice as the actus reus of rape.[28] Thus, there are at least two different ways of committing rape. *Sansregret* involved the latter.[29]

There are also two ways of characterizing the consent element to be proved in the second type of rape, involving coerced consent. One could view this as a situation in which there was consent, but it was extorted, forced, or otherwise not freely given.[30] Or, it could be viewed as a special subset of the cases in which there was not consent, because what appeared to be consent was not really genuine under the circumstances, that is, owing to its extortion.[31]

On a practical level, why bother to make either of these distinctions? Does it matter whether there is nonconsent or coerced consent? And does it matter whether, with regard to coerced consent, it is genuine consent but tainted by its extortion, or it is not consent because it was extorted and therefore not genuine? One of the judges deciding the intermediate appeal in the *Sansregret* case thought that at least the first distinction made a crucial difference to the required mens rea. Unfortunately, his explanation seemed to get a bit lost in a tangle about the second distinction.

In his Manitoba Court of Appeal decision, Judge Huband argued that there were two categories of rape: the first, intercourse without consent; and the second, intercourse with consent "extorted by threats."[32] He then reasoned that the required mens rea to establish the first type of rape was "intention or recklessness" with regard to the absence of consent.[33] Thus, one who acted "with indifference to the possibility of nonconsent" could be reckless and thereby satisfy the mens rea of this first type of rape.[34] In contrast, in the second type

28. *See* LaFave, *supra* note 14, § 7.18, at 753 (describing nonconsent as a traditional element of rape, an element that could be proved by showing physical resistance or such force or threats as to make resistance unavailing).

29. *See* Sansregret v. The Queen, [1985] 1 S.C.R. 570, 572, 580 (Can.).

30. *See* R. v. Sansregret, [1983] 25 Man. R.2d 123, 128 (Can.) (Huband, J., concurring).

31. *See id.* at 129 (describing the common-law view).

32. *Id.* at 128 (Huband, J., concurring). In Judge Huband's words, "Where a male person has sexual intercourse with a female person who is not his wife, without her consent, he commits rape. Where the sexual act is with consent, but the consent is extorted by threats or fear of bodily harm, the crime of rape is also committed, but in an entirely different way. We are here dealing with a case . . . [in] the second category; consent extorted by threats." *Id.* At the time *Sansregret* was decided, the first type of rape was covered by Canadian Criminal Code § 143(a) and the second by § 143(b)(i). *See Sansregret*, 1 S.C.R. at 580-81.

33. *Sansregret*, 25 Man. R.2d at 128 (Huband, J., concurring) (citing Pappajohn v. The Queen, [1980] 2 S.C.R. 120 (Can.)).

34. *Id.* at 129 (Huband, J., concurring) (quoting Judge Dickson's dissenting opinion in Leary v. R., [1978] 1 S.C.R. 29, 35 (Can.)).

of rape, involving "extorted consent," there is "every indication of consent," so the significant issue becomes instead whether the accused "honestly believed that his threats did not induce the consent" or was "reckless as to whether the consent which was extorted was genuine or feigned."[35] In short, according to Judge Huband, the mens rea of nonconsensual rape is recklessness as to the fact of nonconsent, while the mens rea of coerced consent rape is recklessness as to the sincerity of the consent.[36]

With one modification, Judge Huband's argument makes sense. When the nature of the actus reus of rape changes, essentially the element to be proved changes as well. And when the element to be proved changes from nonconsent to coerced consent (whether the latter is characterized as genuine-but-forced or not-genuine-because-forced), the mens rea attaching to that element can also change. Therefore, to the extent Judge Huband was maintaining that a different mens rea might be required to establish the second type of rape as opposed to the first, he probably was correct. The first type of rape has as an element nonconsent. Thus, the mens rea to be established should be, for example, recklessness (if that is the jurisdiction's choice of mens rea) with regard to whether the complainant was consenting. The second type of rape has as an element coerced consent. Thus, the mens rea to be established should be, using the analogous example, recklessness (again, if that is the jurisdiction's choice of culpable mental state) with regard to whether consent was coerced.

Where Judge Huband's decision becomes somewhat confusing is in his specific explication of that second required mens rea. Instead of describing it as recklessness as to whether consent was coerced, he describes it as recklessness as to the genuineness of the consent. Arguably, this makes a difference: the former focuses on the aggressor's actions—what was his mental state with regard to *his* acts of coercion—while the latter focuses on the complainant's reaction—what was the aggressor's mental state with regard to the sincerity of *the victim's* consent.[37] It might be more reasonable to expect a

35. *Id.* at 129-30 (Huband, J., concurring). He then concluded that the very act of proceeding with sexual intercourse immediately after an extended period of threatening behavior constituted recklessness with regard to whether consent was extorted. *Id.* at 130 (Huband, J., concurring).

36. Judge Huband described the latter as "not caring whether the consent be real or otherwise." *Id.* (Huband, J., concurring).

37. The former focuses on the defendant's acts of coercion only if it is the defendant who is doing the coercing. Some rape statutes are drafted seemingly to inculpate only when it is the defendant who has done the coercing. Presumably this will usually be the case, though it is possible that the victim could be coerced into sex with the defendant through acts of someone other than the defendant, or where the coercion comes from some other source. If these latter scenarios occur, the defendant would be expected to perceive something about a third party's *behavior* or some other existent *state of affairs*, rather than about the victim's *state of mind*; the first two still

defendant to discern something about his own behavior (whether he has acted in such a fashion as to have coerced consent) than to expect him to perceive something about someone else's state of mind (whether the complainant's apparent consent was sincere). Ultimately, however, the evidence used to establish the coercion of the consent and the resulting insincerity of the consent is probably at least overlapping, if not identical. It should usually boil down to what the defendant said and did and what the complainant said and did, no matter which of these is the ultimate issue to be proved. Moreover, when the first type of rape (nonconsensual) is at issue, we expect the accused to have perceived whether the complainant was consenting; this, too, is an expectation that similarly focuses on assessing another person's state of mind.[38]

Perhaps Judge Huband described the mens rea inquiry as he did because he was introducing the second distinction mentioned earlier, between the two different ways to characterize coerced consent rape. If we look at this type of rape as involving a case in which there was genuine consent but it was tainted by its extortion, then the element to be proved is the extortion of the consent, not the sincerity. Since it is conceded that there was true consent, sincerity seems irrelevant. Consequently, the mens rea that would attach would be recklessness as to the extortion of the consent, not as to its sincerity, contrary to what Judge Huband said.

On the other hand, if we look at this type of rape as involving a situation in which there really was no consent because it was extorted and therefore not genuine, then the element to be proved would seem to have several parts: that the seeming consent was extorted, that the seeming consent was not genuine because of this extortion, and, therefore, that there was no consent. Although this indicates three aspects to the consent element, the latter two of them—the insincerity of consent and, therefore, the absence of true consent—are essentially conclusions that stem from the prerequisite fact of the first aspect—extortion. Thus, the crucial element to be proved is still the extortion, with the insincerity and then absence of consent necessarily following once extortion is established. Consequently, the mens rea that would attach would probably still be recklessness as to the fact of the extortion, but perhaps also recklessness as to the effects of the extortion (insincerity of and absence of true consent).

Judge Huband seemed to focus on the effect of the extortion, which relates to the second characterization of coerced consent, when he described the required mens rea as going to the issue of the

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seem to be more readily discernable details than the third, as they might be more likely to have objectively observable manifestations.

38. One could question the wisdom of this requirement as well. *See, e.g.*, Brett, *supra* note 27 (arguing for an objective rather than subjective determination of consent).

genuineness or insincerity of the consent. But, as just explained, the fact of the extortion should still be a significant element to be proved in coerced consent rape no matter which characterization is adopted. Therefore, contrary to Judge Huband's delineation, a mens rea attaching to the fact of extortion would also seem to be required no matter which characterization of coerced consent is adopted.

To return to the larger point, there is a difference between nonconsensual rape and coerced consent rape, and that difference logically should lead to a difference in how one conceives the required mens rea element. The next several sections discuss what level of mens rea seems to be required in various jurisdictions. Whichever level is required, it then must be attached either to the nonconsent or coerced consent element, depending on which type of rape is under consideration in any given case. And if it is coerced consent that is at issue, no matter how coerced consent is conceptualized, that mens rea should attach at least to the fact of coercion, whether or not it also attaches to the sincerity of any apparent trappings of consent that followed the coercion.

C. *The Morass of Mens Rea in American Rape Law*

To understand exactly what ought to have been proved to establish guilt in *Sansregret* and any similar case, I wondered what culpable mental state with regard to nonconsent must be proved to convict someone of rape, particularly in the United States. When I first considered this question, I thought the answer would be straightforward, though it might differ from one jurisdiction to another.[39] It was not. Quite apart from the task of examining fifty different states' laws, the task of resolving the ambiguities within these laws proved daunting.[40]

For example, some state statutes define rape with a nonconsent or coerced consent requirement, either expressly or by implication, but with no specification of culpable mental state in the statute.[41] In these

39. *See, e.g.*, Model Penal Code § 213.1 cmt. 1 (1980) ("Older statutes dealing with [the] range of misconduct [constituting rape] have varied widely in the detail with which they have described the offensive acts."); Dressler, *supra* note 12, § 33.01[B], at 569 & n.7 ("American rape statutes vary considerably in their language.").

40. *See* Dana Berliner, *Rethinking the Reasonable Belief Defense to Rape*, 100 Yale L.J. 2687, 2691 (1991) ("Only a few jurisdictions indicate which level of intent suffices for a rape conviction. Most states simply fail to discuss levels of intent in rape cases."); Bryden, *supra* note 22, at 325 ("[T]he law on the mens rea for rape is muddled.").

41. *See* Alaska Stat. § 11.41.410(a)(1) (2001) (specifying a nonconsent element); Cal. Penal Code § 261(a)(2) (2001) (defining rape as an act of sexual intercourse "against a person's will"); Conn. Gen. Stat. § 53a-70(a)(1) (2001) (defining sexual assault as "compel[ling] another person to engage in sexual intercourse" by the use or threat of force); Fla. Stat. ch. 794.011 (2000); Ga. Code Ann. § 16-6-1(a)(1) (2000) (defining rape as carnal knowledge of a female "against her will"); Idaho Code § 18-6101(3)-(4) (2000) (defining rape as sexual penetration where a female resists or is

jurisdictions, case law may or may not clearly supply the missing required mens rea for the nonconsent element.[42]

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prevented from resisting); Iowa Code § 709.1(1) (2001) (defining sexual abuse as any sex act that is done by force or against the will of the victim); Kan. Stat. Ann. § 21-3502(a) (2000) (specifying a nonconsent element); Ky. Rev. Stat. Ann. § 510.020 (2001) (providing that nonconsent is an element of every sexual act in this chapter), § 510.040 (2001) (defining the sexual act of rape); La. Rev. Stat. Ann. § 14:42.1 (2000) (specifying nonconsent element); Me. Rev. Stat. Ann. tit. 17-A, § 253 (1)(A), (2)(B) (2000) (defining gross sexual assault to include sexual acts involving compulsion); Md. Ann. Code art. 27, § 462 (2001) (specifying a nonconsent element); Mass. Ann. Laws ch. 265, § 22 (Law. Co-op. 2001) (defining rape as sexual intercourse by force and against the victim's will); Miss. Code Ann. § 97-3-95 (2001) (specifying a nonconsent element); Neb. Rev. Stat. Ann. § 28-319(1) (Michie 2001) (specifying nonconsent element); Nev. Rev. Stat. Ann. §200.366 (Michie 2001) (defining sexual assault as sexual penetration "against the will of the victim"); N.Y. Penal Law § 130.05 (McKinney 2001-2002) (specifying a nonconsent element); N.C. Gen. Stat. § 14-27.2(a)(2) (2000) (defining rape as vaginal intercourse by force and "against the will" of the victim, later explained as connoting nonconsent in *State v. Booher*, 290 S.E.2d 561, 564 (N.C. 1982)); N.D. Cent. Code § 12.1-20-03(1)(a) (2000) (defining gross sexual imposition as a sexual act in which the defendant "compels the victim to submit"); Utah Code Ann. § 76-5-402(1) (2001) (specifying a nonconsent element); Vt. Stat. Ann. tit. 13, § 3252(a)(1)(A) (2001) (specifying nonconsent element); Va. Code Ann. § 18.2-61 (Michie 2001) (defining rape as sexual intercourse "against the complaining witness's will"); W. Va. Code Ann. § 61-8B-2 (Michie 2001) (indicating that all sexual offenses include a nonconsent element); Wis. Stat. § 940.225 (2000) (specifying a nonconsent element). In a rare exercise in clarity, Tennessee's rape statute specifies a nonconsent element and also explicitly includes an accompanying mental state. Tenn. Code Ann. § 39-13-503(a)(2) (2001) (defining rape as sexual penetration "accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the penetration that the victim did not consent"). Similarly, in North Dakota, the sexual assault statute specifies that sexual contact is illegal if the defendant "knows or has reasonable cause to believe that the contact is offensive to the other person." N.D. Cent. Code § 12.1-20-07(1)(a) (2000).

42. For states in which case law supplies the otherwise unspecified mens rea, or specifies that none is required, see, for example, *Reynolds v. State*, 664 P.2d 621, 625 (Alaska Ct. App. 1983) (holding that mens rea of recklessness applies to the "surrounding circumstance" element of nonconsent); *People v. Williams*, 841 P.2d 961, 968-69 (Cal. 1992) (holding that a minimum mens rea of recklessness applies to the element of nonconsent); *State v. Smith*, 554 A.2d 713, 715-17 (Conn. 1989) (holding that sexual assault does not require a specific intent with regard to the element of nonconsent); *Buford v. State*, 492 So. 2d 355, 359 (Fla. 1986) (holding that sexual battery is not a specific intent crime); *Williams v. Kemp*, 338 S.E.2d 669, 672 n.1 (Ga. 1986) (indicating that sexual assault is not a specific intent crime); *Lamar v. State*, 254 S.E.2d 353, 355-56 (Ga. 1979) (implying no mens rea is necessary as to nonconsent because force "negates any possible mistake as to consent"); *State v. Lopez*, 892 P.2d 898, 901 (Idaho 1995) (ruling that rape performed by overcoming the victim's resistance is not a specific intent crime); *State v. Donelson*, 302 N.W.2d 125, 136 (Iowa 1981) (holding that sexual abuse does not require a specific intent); *State v. Lile*, 699 P.2d 456, 458 (Kan. 1985) (holding that, beyond the general intent to commit the prohibited act, no specific intent on the defendant's part is required to commit rape); *State v. Reed*, 479 A.2d 1291, 1296 (Me. 1984) (holding that "rape compelled by force or threat requires no culpable state of mind"); *Commonwealth v. Grant*, 464 N.E.2d 33, 35-36 (Mass. 1984) (holding that specific intent that intercourse be without consent is not an element of rape); *Roberson v. State*, 501 So. 2d 398, 401 (Miss. 1987) (holding that no mens rea is necessary with regard to nonconsent); *State v. Trackwell*, 509 N.W.2d 638, 645 (Neb. 1994) ("Intent is not an element of first degree sexual assault . . . ."); *People v. Williams*, 614 N.E.2d 730, 736-37 (N.Y. 1993) (holding that

Other rape statutes specify a culpable mental state in conjunction with the act of intercourse, but do not include any mental state specifically with regard to an express or implied nonconsent element.[43] Such a statute, for example, might provide that one who "knowingly has intercourse without the complainant's consent" is guilty of rape.[44] In these jurisdictions, the specified mens rea might or might not carry over to the element of nonconsent.[45] Case law may or may not clarify the matter.[46]

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lack of consent results from forcible compulsion, for which there is a required mens rea of intent to forcibly compel another to engage in intercourse or sodomy); *Clifton v. Commonwealth*, 468 S.E.2d 155, 158 & n.1 (Va. Ct. App. 1996) (ruling that "the defendant's state of mind regarding the issue of consent is *not* an element the Commonwealth is required to prove"). Case law in some jurisdictions, such as Louisiana, Nebraska, North Carolina, Vermont, and West Virginia, does not appear to clarify whether a mens rea applies to the nonconsent element when the statute is silent on the matter. *See* Malone v. Commonwealth, 636 S.W.2d 647 (Ky. 1982) (indicating that knowledge or intent are not required, but not specifying exactly what mental state, if any, is required); State v. Fletcher, 341 So. 2d 340, 343 (La. 1976) (implying that some mens rea might attach to the nonconsent element by entertaining a defense of mistake of fact as to consent); Stebbing v. State, 473 A.2d 903, 910 (Md. 1984) (referring to a state prosecutor's assertion that "rape is a general intent crime"); Winnerford v. State, 915 P.2d 291, 294 (Nev. 1996) (stating only that sexual assault is a general intent crime, without specifying whether that refers to the nonconsent element); State v. Cummins, 347 N.W.2d 571, 572 (N.D. 1984) (stating that willfully is the required culpability for gross sexual imposition, which is a general intent crime, but not clarifying whether that mental state applies to the compulsion (and therefore nonconsent) element); State v. Calamity, 735 P.2d 39, 43 (Utah 1987) (holding that the mens rea of rape is intent, knowledge, or recklessness, but not specifying whether this refers to the nonconsent element).

43. *See* Ariz. Rev. Stat. § 13-1406 (2000) ("intentionally or knowingly engaging in sexual intercourse . . .without consent"); Colo. Rev. Stat. § 18-3-402 (2000) ("knowingly inflicts sexual intrusion . . . against the victim's will"); Del. Code Ann. tit. 11, § 773(a) (2000) ("intentionally engages in sexual intercourse . . . without the victim's consent"); Haw. Rev. Stat. § 707-731(1)(a) (1993) ("knowingly subjects another person to an act of sexual penetration by compulsion"); *id.* § 707-700 ("'Compulsion' means absence of consent . . ."); Ind. Code § 35-42-4-1(a)(1) (2001) ("knowingly or intentionally has sexual intercourse . . . when . . . the other person is compelled by force or imminent threat of force"); Mont. Code Ann. § 45-5-502 (2000) ("knowingly subjects another person to any sexual contact without consent"); Tex. Penal Code Ann. § 22.011(a)(1)(A) (Vernon 2002) (defining sexual assault as "intentionally or knowingly. . . caus[ing] the penetration of the . . . sexual organ of another person . . . without that person's consent").

44. *See supra* note 43.

45. *See, e.g.*, Ariz. Rev. Stat. § 13-202 (2001) (indicating that a generally prescribed mental state applies to each element of an offense unless a contrary legislative purpose is plain); Del. Code Ann. tit. 11, § 252 (2001) (indicating that, absent a contrary legislative purpose, the prescribed general mental state applies to all elements of the offense); Ind. Code. § 35-41-2-2(d) (1998) (indicating that a required culpability applies to every material element of an offense unless the statute provides otherwise); Mont. Code Ann. § 45-2-103(4) (2000) (indicating that a generally prescribed mental state applies to each element of an offense). In some states, such as Texas, statutes do not indicate whether the specified mens rea is to be applied to the nonconsent element. *See, e.g.*, Tex. Penal Code Ann. § 6.02 (Vernon 1994).

46. *Compare* State v. Witwer, 856 P.2d 1183, 1186 (Ariz. Ct. App. 1993) (ruling that § 13-202 applies to the sexual abuse statute §13-1404, so that the mens rea of

In yet other jurisdictions, rape is so defined that consent does not appear to be an element.[47] Even under these statutes, however, it is possible that consent becomes relevant nonetheless, and therefore that the mens rea with respect to consent is still in issue.[48] This could occur if the act element is interpreted essentially to require proof of nonconsent. For example, a statute that defined rape as intercourse by forcible compulsion could be read to require evidence of nonconsent in order to establish the necessary force or compulsion.[49]

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knowingly applies to the element that the defendant's sexual contact be without consent), *and* State v. Adams, 880 P.2d 226, 234 (Haw. Ct. App. 1994) (holding that mens rea of knowingly carries over to the element of nonconsent), *with* Dunton v. People, 898 P.2d 571, 573 (Colo. 1995) (holding that no mens rea attaches to the nonconsent element because the prohibited acts cause the victim to be unable to consent). In Delaware, the nonconsent element is defined so that the defendant must somehow compel the victim to submit, and she must resist "to the extent that it is reasonably necessary to make the victim's refusal to consent known to the defendant." Del. Code Ann. tit. 11, § 761(h)(1) (2001). In Texas, case law does not seem to clarify whether the specified mens rea applies to the nonconsent element.

47. *See* Ala. Code § 13A-6-61 (2000); Ark. Code Ann. § 5-14-103 (Michie 2000); D.C. Code Ann. § 22-4102 (2000); 720 Ill. Comp. Stat. Ann. 5/12-13 (2001); Minn. Stat. §§ 609.342 (2000), 609.343 (2001), 609.344 (2001); Mo. Rev. Stat. § 566.030 (2000); N.H. Rev. Stat. Ann. § 632-A:2 (2000); N.J. Stat. Ann. § 2C:14-2 (West 2001); N.M. Stat. Ann. § 30-9-11 (Michie 2000) (as exemplified by State v. Jiminez, 556 P.2d 60, 63 (N.M. Ct. App. 1976) (absence of consent is not an element of the new crime that replaced the old rape statute)); Ohio Rev. Code Ann. § 2907.03 (Anderson 2001); Okla. Stat., tit. 21, § 1111 (2000); Or. Rev. Stat. § 163.375 (1999); 18 Pa. Cons. Stat. § 3121 (2000); R.I. Gen. Laws § 11-37-2 (2001); S.C. Code Ann. § 16-3-652 (Law. Co-op. 2000); S.D. Codified Laws § 22-22-1 (Michie 2001); Wash. Rev. Code § 9A.44.040 (2001); Wyo. Stat. Ann. § 6-2-302 (Michie 2001); *cf.* LaFave, *supra* note 14, § 7.20, at 772 ("Contemporary statutes in virtually all jurisdictions either list absence of consent as one of the elements of the crime or else indicate that consent is a defense.").

48. *See* Michelle J. Anderson, *Reviving Resistance in Rape Law,* 1998 U. Ill. L. Rev. 953, 1000-01 (explaining that, in states that omit nonconsent and define rape only to include force, consent is a defense under case law, and, in any event, courts require both nonconsent and force to establish rape despite different statutory formulations); *see also* Ky. Rev. Stat. Ann. § 510.020 (Banks-Baldwin 2001) (stating that lack of consent is an element of every sexual offense); Mosley v. State, 914 S.W.2d 731, 734 (Ark. 1996) ("The test for determining whether there was force is whether the act was against the will of the party upon whom the act was committed."); People v. Thomas, 421 N.E.2d 357, 362 (Ill. App. Ct. 1981) (holding that rape requires proof "that intercourse was committed by force and against the will of the female"); Commonwealth v. Williams, 439 A.2d 765, 768 (Pa. Super. Ct. 1982) ("The force necessary to support convictions for rape . . . need only be such as to establish lack of consent . . .").

49. *See* Model Penal Code § 213.1 cmt. 4 (1980) ("Compulsion plainly implies non-consent . . . ."); Dressler, *supra* note 12, §33.04[B][1][a], at 577 ("Typically, the elements of nonconsent and force merge."); Samuel H. Pillsbury, *Crimes of Indifference*, 49 Rutgers L. Rev. 105, 164 (1996) ("[A]lthough treated in rape law as an independent element, force often operates as a proxy for awareness of nonconsent."); *see also* Inge v. Commonwealth, No. 1628-98-2, 2000 Va. App. LEXIS 457, at *8 (Va. Ct. App. June 20, 2000) ("To determine whether the element of force has been proved in the crime[] of non-statutory rape . . . the inquiry is whether the act or acts were effected with or without the victim's consent."). *Cf.* Alan Wertheimer, *What Is Consent? And Is It Important?*, 3 Buff. Crim. L. Rev. 557, 558-59 (2000) (arguing that force and nonconsent are so intertwined in practice that, even when

Finally, some jurisdictions delineate a mens rea with regard to nonconsent, either statutorily or through case law, but then have a separate rule allowing for a mistake of fact "defense."[50] This is

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nonconsent is the defining criterion of rape, it will often be difficult to prove nonconsent beyond a reasonable doubt absent evidence of force by the perpetrator or resistance by the victim). *But see* Mich. Comp. Laws § 750.520b (2001) (defining sexual assault as forced or coerced sexual penetration that causes injury) (as interpreted in State v. Stull, 338 N.W.2d 403, 406-07 (Mich. Ct. App. 1983) (holding that nonconsent is not an element of rape, even though the statute requires force or coercion and consent may be evidence of lack of force or coercion)); Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 Colum. L. Rev. 1780, 1785-92 (1992) (maintaining that force and nonconsent are separate and distinct elements).

50. *See, e.g.*, Alaska Stat. § 11.81.620 (Michie 2001) (as exemplified in *Reynolds v. State*, 664 P.2d 621, 624 (Alaska Ct. App. 1983) ("It is a defense to a charge of forcible rape that the defendant entertained a reasonable and good faith belief that the female person voluntarily consented to engage in sexual intercourse.")); Ariz. Rev. Stat. § 13-204(A)(1) (2000) ("Ignorance or a mistaken belief as to a matter of fact does not relieve a person of criminal liability unless . . . [i]t negates the culpable mental state required for commission of the offense . . . .") (as exemplified in *People v. Williams*, 841 P.2d 961, 965 (Cal. 1992) ("[A] defendant's reasonable and good faith mistake of fact regarding a person's consent to sexual intercourse is a defense to rape.")); Del. Code Ann. tit. 11, § 441(1) (2001) ("[I]t is a defense that the accused engaged in the conduct charged . . . under ignorance or mistake of fact if . . . [t]he ignorance or mistake negatives the state of mind for the commission of the offense . . . ."); Haw. Rev. Stat. § 702-218 (2000) (as exemplified in *State v. Adams*, 880 P.2d 226, 235 (Haw. Ct. App. 1994) (implying that a defendant's reasonable belief in consent could be a defense to rape)); Ind. Code § 35-41-3-7 (2000) ("It is a defense that the person who engaged in the prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the culpability required for commission of the offense.") (as exemplified in *Potter v. State*, 684 N.E.2d 1127, 1135 (Ind. 1997)); Tenn. Code Ann. § 39-11-502 (2001) ("[I]gnorance or mistake of fact is a defense to prosecution if such ignorance or mistake negates the culpable mental state of the charged offense."). *But see, e.g.*, State v. Christensen, 414 N.W.2d 843, 846 (Iowa Ct. App. 1987) ("'Sexual abuse [does not] require a specific intent' . . . [so] that a defendant's knowledge of his or her partner's lack of consent is not an element . . . [and so] mistake of fact as to that consent would not negate an element of the offense."). Louisiana includes a consent element for forcible and aggravated rapes, La. Rev. Stat. Ann. §§ 14:42, 14:42.1 (West 2000), and does not clarify whether a mens rea attaches to this element, but seems to recognize the possibility that the state's mistake of fact rule, La. Rev. Stat. Ann. § 14:16 (West 2000), could apply at least to aggravated rape. *See* State v. Fletcher, 341 So. 2d 340, 343 (La. 1976) (ruling that the jury could conclude on the facts that "the defendant was not justified by any 'reasonable ignorance of fact or mistake of fact' . . . to conclude that the victim consented to the act").

"Defense" is in quotation marks in the text because, technically, a mistake of fact is not really a defense to an otherwise illegal act, but rather negates the mens rea required for commission of the crime in the first instance. *See* Pappajohn v. The Queen, [1980] 2 S.C.R. 120, 148 (Can.) (Dickson, J., dissenting) ("Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence. . . . Mistake is a defence though, in the sense that it is raised as an issue by an accused. The [prosecutor] is rarely possessed of knowledge of the subjective factors which may have caused an accused to entertain a belief in a fallacious set of facts."); Dressler, *supra* note 12, § 12.02, at 152-53 (explaining that a mistake of fact is really only a failure of proof of the mens rea element of the crime, characterized as a "defense" because "the defendant may be required to produce evidence that he was mistaken," even though the prosecution retains the burden of

particularly relevant in the kinds of rape discussed in this article and was relevant in *Sansregret* itself. When Sansregret's ex-girlfriend said she had not consented to intercourse, his predictable response was that he thought she had consented, that is, he made a mistake about the fact of her nonconsent.[51] A mistake of fact is not supposed to exonerate unless it negates the mens rea required for commission of the crime charged.[52] Nevertheless, in some jurisdictions it appears that application of the governing mistake rule alters the otherwise required mens rea.[53] This appeared to be so in the interpretation of Canadian rape law by some of the judges in the *Sansregret* case.[54] In these jurisdictions, the mens rea required to prove rape in cases in which the defendant alleges a mistake regarding consent would ultimately seem to be something other than that delineated in the state's rape law. Exactly what it would be will depend on the particular mens rea and mistake rules.[55]

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persuading the fact-finder that the defendant was not mistaken and therefore possessed the requisite mens rea). One exception to the notion that mistake regarding consent is not really a defense is found in Illinois. There, criminal sexual assault is defined without a nonconsent element, 720 Ill. Comp. Stat. 5/12-13 (2001), so that the state's general mistake rule, 720 Ill. Comp. Stat. 5/4-8 (2001) (making mistake of fact a defense if it negates a mental state prescribed by statute with respect to an element of the offense), would not apply. However, consent is expressly made a defense to criminal sexual assault by operation of a different statute. 720 Ill. Comp. Stat. 5/12-17 (2001) (making consent a defense to § 5/12-13 "where force or threat of force is an element of the offense").

51. *See* R. v. Sansregret, [1983] 22 Man. R.2d 115, 119 (Can.) ("The accused says that . . . notwithstanding that he held a knife while they talked, notwithstanding that he did most of the talking and that the complainant's answers were clearly equivocal, he presumed and believed that everything between them was peachy.").

52. *See* Dressler, *supra* note 12, § 12.02, at 152-53; LaFave, *supra* note 14, § 5.1, at 432 ("Ignorance or mistake as to a matter of fact or law is a defense if it negatives a mental state required to establish a material element of the crime . . . .").

53. *See, e.g.*, Ind. Code Ann. § 35-42-4-1 (2000) (providing that rape is "knowingly or intentionally" having intercourse with someone who is being "compelled by force or imminent threat of force"); *id.* § 35-41-2-2 (2000) (providing that the specified culpability applies to every material element of an offense); *Potter*, 684 N.E.2d at 1135 (holding that mistake of fact is a defense to a rape charge only if the mistake is "honest and reasonable"); *Adams*, 880 P.2d at 234-35 (holding that sexual assault requires proof that the defendant knew he did not have consent, but also implying that it might be a defense if the defendant "reasonably believe[d] that he had . . . consent"). In these two jurisdictions, the mistake rule appears to lower the mens rea from knowledge, as stated in the otherwise applicable statutes, to recklessness.

54. *See* Sansregret v. The Queen, [1985] 1 S.C.R. 570, 581 (Can.) (describing minimum mens rea for rape as recklessness, but indicating that an honest though unreasonable mistake would negate that mens rea); R. v. Sansregret, [1983] 25 Man. R.2d 123, 128-30 (Can.) (Huband, J., concurring); *id.* at 130-36 (Philp, J., dissenting). In contrast to the jurisdictions cited in the previous footnote, this application of the mistake rule appears to heighten rather than lower the mens rea, in this case from recklessness (as stated by the judges) to knowledge.

55. To add to the confusion, many courts in jurisdictions employing a mistake defense have recently superimposed a "rule of equivocality" as a threshold for admitting evidence of mistake. Pursuant to these rules, the defendant may not argue mistake unless the evidence of consent was equivocal rather than simply disputed.

For example, in some jurisdictions a reasonable mistake of fact may qualify as a defense.[56] Suppose a rape defendant in such a jurisdiction makes an unreasonable mistake about nonconsent. Suppose further that the rape law in this jurisdiction requires knowledge of nonconsent for a rape conviction. The defendant might not have had the required mens rea with regard to consent. His honest, though unreasonable, mistake negates "knowledge" of nonconsent because he mistakenly thought his partner was consenting and so did not have knowledge of her nonconsent. If the mistake rule applies nonetheless, and supercedes the otherwise applicable mens rea requirement in the rape law, he may be found not to have a mistake defense and to be guilty, even though the rape statute would otherwise seem to require knowledge of nonconsent.[57] In this case, the mistake rule would operate to reduce the otherwise required mens rea.

Conversely, in both *Sansregret* appeals, Court of Appeal Judges Huband and Philp and Supreme Court Judge McIntyre (writing for a unanimous court) indicate that recklessness is the mens rea with regard to nonconsent or coerced consent, but then apply the honest-mistake-is-a-defense rule.[58] If an honest mistake about consent is a defense, knowledge of nonconsent or coerced consent is effectively the required mens rea for the commission of rape, not recklessness as to consent.[59] In this case, the mistake rule operates to raise the otherwise required mens rea.

See, e.g., *Williams*, 841 P.2d at 965 (explaining that a mistake defense to rape has an evidentiary threshold, for which "a defendant must adduce [substantial] evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was consent"); *see generally* Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. Crim. L. & Criminology 815 (1996). *But see Williams*, 841 P.2d at 971 (Mosk, J., concurring) (arguing that, logically, evidence of equivocal conduct is sufficient but not necessary for the mistake-of-fact-regarding-consent defense to apply to rape). Presumably, in these jurisdictions, the normally applicable mens rea rule would apply, and any incongruent mistake rule could potentially alter the otherwise applicable mens rea only if and when the threshold showing of equivocality were met. At least in theory, this would mean that the "ultimate" mens rea standard for rape—that is, the level of mens rea sufficient for conviction after applying both the rape statute and any applicable mistake rule—could change from case to case, depending on the facts.

56. *See, e.g.*, 18 Pa. Cons. Stat. § 304(1) (2001) ("Ignorance or mistake as to a matter of fact, for which there is a reasonable explanation or excuse, is a defense if [it] negatives the intent, knowledge, belief, recklessness, or negligence required to establish a material element of the offense."); Tex. Penal Code Ann. § 8.02(a) (Vernon 2002) ("It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense.").

57. *See supra* note 53.

58. *See supra* note 54.

59. This is explained more fully *infra* Part I.D.2.

D. *The Mens Rea Required to Establish Rape*

1. Generally

After wading through the morass, it appears that the various American jurisdictions require different mens rea to prove rape.[60] At one time, including when *Sansregret* was decided, it was the law in Great Britain, Canada, and other common law jurisdictions that a defendant must know he does not have consent, or must know that he has coerced consent, to be guilty of rape.[61] Apparently, this is no longer the case in most common law jurisdictions,[62] but it is still the rule in a few United States jurisdictions.[63] In one state, it seems that the defendant must have a purpose to have nonconsensual sex in order to commit rape.[64] In other states, recklessness about nonconsent

60. Although I have attempted to chart the required mens rea in each state, some of the rules in the jurisdictions cited in the footnotes that follow in this section are sufficiently ambiguous that they could easily be argued to fit into different categories than those designated.

61. *See, e.g.*, Sansregret v. The Queen, [1985] 1 S.C.R. 570 (Can.); Dir. of Pub. Prosecutions v. Morgan, 1976 A.C. 182 (H.L. 1975) (Eng.) (appeal taken from C.A.). *But see* Simon Gardner, *Reckless and Inconsiderate Rape*, 1991 Crim. L. Rev. 172 (1991) (arguing that the *Morgan* case did not really impose a true knowledge standard, but rather also allowed for conviction if the defendant did not care whether or not he had consent; further noting that the supposed statutory embodiment of *Morgan*, although not correctly followed in subsequent cases, allowed for conviction for reckless rape).

62. *See, e.g.*, Confronting Sexual Assault, *supra* note 11, at 11, 352-53 (describing and quoting 1992 legislative amendments to the sexual offenses laws in Canada in which the rule for mistake of fact regarding consent is changed and the mens rea of rape is effectively lowered at least to recklessness).

63. *See* Ariz. Rev. Stat. § 13-202(A) (2001) (indicating that a generally prescribed culpable mental state applies to each element of an offense unless a contrary purpose is plain); *id.* § 13-1406(A) (2000) (defining sexual assault as "intentionally or knowingly engaging in sexual intercourse . . . with any person without consent of such person") (as exemplified in *State v. Witwer*, 856 P.2d 1183, 1186 (Ariz. Ct. App. 1993) (finding that a mens rea of knowledge applies to the comparable nonconsent element in the sexual abuse statute)); Haw. Rev. Stat. § 707-730(1)(a) (2000) (defining first degree sexual assault as "knowingly" subjecting another to sexual penetration by strong compulsion); *id.* § 707-731(1)(a) (defining second degree sexual assault as "knowingly" subjecting another to sexual penetration by compulsion, as exemplified in *State v. Adams*, 880 P.2d 226, 234 (Haw. Ct. App. 1994) (holding that second degree sexual assault requires "that the defendant knew that he or she did not have the consent of the alleged victim to engage in the act of penetration")); Mont. Code Ann. § 45-2-103(4) (2000) ("If the statute . . . prescribes a particular mental state with respect to the offense as a whole without distinguishing among the elements . . . the prescribed mental state applies to each element"); *id.* § 45-5-502(1) (2000) ("A person who knowingly subjects another person to any sexual contact without consent commits . . . sexual assault."); *see also* People v. Williams, 614 N.E.2d 730, 736-37 (N.Y. 1993) (opining that nonconsent is an element of rape, but it results from forcible compulsion, so that the required proof of "intent to forcibly compel" intercourse necessarily also establishes that the "defendants believed the victim did not consent").

64. In Ohio, nonconsent may enter as an element of rape by implication because

would seem to suffice.[65] Using the Model Penal Code's formulation of recklessness, which largely comports with common-law understandings, this means the defendant must be shown to have consciously disregarded a substantial and unjustifiable risk that the complainant was not consenting when he proceeded to have intercourse with her.[66] In other American jurisdictions, negligence with regard to consent appears to be the current standard.[67] And, in a

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the statute includes "purposely compel[ling an]other person to submit [to sexual conduct] by force or threat of force." Ohio Rev. Code Ann. § 2907.02(A)(2) (Anderson 2001). If compulsion implies nonconsent, then nonconsent would appear to be an element. Case law confirms that "purposely" is the mens rea that attaches to the element of compulsion. State v. Wilkins, 415 N.E.2d 303, 306-07 (Ohio 1980). Thus, it is possible that one must have a purpose to have nonconsensual intercourse.

65. *See* Reynolds v. State, 664 P.2d 621, 625 (Alaska Ct. App. 1983) ("[T]he state must prove that the defendant acted 'recklessly' regarding his putative victim's lack of consent."); People v. Williams, 841 P.2d 961, 968-69 (Cal. 1992) (Mosk, J., concurring) (citing *People v. Mayberry*, 542 P.2d 1337, 1345 (Ca. 1975) for the proposition that the minimum mens rea of rape is recklessness, meaning with conscious disregard of a substantial and unjustifiable risk that the act is unconsented and forcible); State v. Mitchell, 558 N.E.2d 559, 567 (Ill. App. Ct. 1990) (ruling that "[c]riminal sexual assault is a general intent offense in which the mental state of intent, knowledge, or recklessness is implied"); People v. Witte, 449 N.E.2d 966, 971 n.2 (Ill. App. Ct. 1983) (ruling that rape does not require knowledge of the victim's lack of consent, and implying that a reasonable belief in consent could be a defense); State v. Oliver, 627 A.2d 144, 151-52 (N.J. 1993) (deducing that the factfinder in a sexual assault case should determine whether the defendant's asserted belief in consent was actually and reasonably held). In some of these cases, the analysis or conclusion could alternatively support a mens rea of negligence as well as recklessness. *See, e.g., Oliver*, 627 A.2d at 144; Bryden, *supra* note 22, at 325-26 (indicating that negligence is the effective mens rea when reasonable mistake about consent is a defense).

66. *See* Model Penal Code § 2.02(2)(c) (1962); *see also* Dressler, *supra* note 12, § 10.04[D][3], at 133 (explaining that common law recklessness has come to mean acting despite awareness of a substantial and unjustifiable risk); Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 Tex. L. Rev. 1351, 1377-80 (1992) (exploring the parameters of criminal recklessness); *cf.* Professor Stephen Schulhofer, Address at the American Association of Law Schools Annual Meeting, Joint Session on Criminal Law and Women and the Law: New Perspectives on Sexual Assault (Jan. 6, 2002) [hereinafter AALS Address] (maintaining that the there may not be a practical difference between reckless and negligent rape, presumably because both are judged by the same objective evidence of nonconsent).

67. *See* Tenn. Code Ann. § 39-13-503 (2001) (defining rape as sexual penetration "accomplished without the consent of the victim and the defendant knows *or has reason to know* at the time of the penetration that the victim did not consent" (emphasis added)); State v. Smith, 554 A.2d 713, 717 (Conn. 1989) ("whether a complainant should be found to have consented depends upon how her behavior would have been viewed by a reasonable person under the surrounding circumstances," not on the defendant's awareness or "reckless disregard of her nonconsenting status"); Russell v. United States, 698 A.2d 1007, 1016 n.12 (D.C. 1997) (holding that in order for a defendant to prove consent he must prove "whether a reasonable person would think that the complainant's 'words or overt actions indicate[d] a freely given agreement to the sexual act or contact in question'" (citation omitted)); State v. Ayer, 612 A.2d 923, 926 (N.H. 1992) ("If . . . the victim objectively communicates lack of consent and the defendant subjectively fails to receive the message, he is guilty. The appropriate inquiry is whether a reasonable person in the circumstances would have understood that the victim did not consent."); *see also* Del.

number of states, courts seem to treat the nonconsent element as one of strict liability, requiring no mens rea for conviction.[68]

Several states do not delineate a particular mens rea with regard to nonconsent either in the relevant statutes or in the case law, nor do they indicate that none is required.[69] In the end, in many, if not most,

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Code Ann. tit. 11, § 761(h)(1) (2001) (defining "without consent" so that "the victim need resist only to the extent that it is reasonably necessary to make the victim's refusal to consent known to the defendant"); State v. Koperski, 578 N.W.2d 837, 843-46 (Neb. 1998) (concluding that, under a predecessor statute, "[t]he appropriate inquiry is whether a reasonable person in the circumstances would have understood that the victim did not consent"); Bryden, *supra* note 22, at 325-26 (stating that negligence is, in effect, the mens rea of rape whenever reasonable mistake about consent is a defense).

68. *See, e.g.*, Ga. Code Ann. § 16-6-1 (2001) (defining rape as carnal knowledge "forcibly and against [the victim's] will," as clarified in *Lamar v. State*, 254 S.E.2d 353, 356 (Ga. 1979) (ruling that the required force necessarily negates any possibility of mistake)); Dunton v. People, 898 P.2d 571, 573 n.2 (Colo. 1995) (holding that sexual assault under a predecessor statute "simply requires the actor's awareness of engaging in certain prohibited acts which the statute equates to nonconsent," and "the actor need not be aware of the victim's actual nonconsent"); State v. Christensen, 414 N.W.2d 843, 845-46 (Iowa Ct. App. 1987) (appearing to rule that sex offenses involve strict liability with regard to consent); State v. Lile, 699 P.2d 456, 458 (Kan. 1985) (holding that the rape statute is constitutional even though it does not permit a defendant to argue that he mistakenly perceived he had consent); State v. Reed, 479 A.2d 1291, 1296 (Me. 1984) (holding that "rape compelled by force or threat requires no culpable state of mind"); Commonwealth v. Lopez, 745 N.E.2d 961, 965 (Mass. 2001) ("[N]o mens rea or knowledge as to the lack of consent has ever been required."); Commonwealth v. Lefkowitz, 481 N.E.2d 227, 231 (Mass. App. Ct. 1985) (holding that rape is proved if the jury concludes that intercourse was nonconsensual [by force or threat of injury], without any special emphasis on the defendant's state of mind); Roberson v. State, 501 So. 2d 398, 401 (Miss. 1987) (holding that sexual battery requires only the intent to do the forbidden act and no other mental element is necessary); Commonwealth v. Williams, 439 A.2d 765, 769 (Pa. Super. Ct. 1982) ("The crux of the offense of rape is force and lack of victim's consent.... If the element of the defendant's belief as to the victim's state of mind is to be established as a defense to the crime of rape then it should be done by our legislature." (citations omitted)); Clifton v. Commonwealth, 468 S.E.2d 155, 158 (Va. Ct. App. 1996) (rejecting defendant's contention that some mens rea, even negligence, must be shown with regard to nonconsent in order to establish rape); State v. Elmore, 771 P.2d 1192, 1193-94 (Wash. Ct. App. 1989) (ruling that the legislative omission to include any culpable mental state in conjunction with the statutory element of nonconsent means no mens rea is required for that element).

69. *See, e.g.*, Ark. Code Ann. § 5-14-103 (Michie 2001) (defining rape as intercourse by forcible compulsion, interpreted to mean without consent as in *Mosley v. State*, 914 S.W.2d 731, 734 (Ark. 1996), but not indicating whether nonconsent involves a mens rea); La. Rev. Stat. Ann. § 14:42.1 (2000); Md. Ann. Code art. 27, § 462 (2001) (including a nonconsent element with no specified mens rea); N.C. Gen. Stat. § 14-27.2 (2000) (defining rape to include vaginal intercourse "against the will" of the victim, but not expressing an accompanying mens rea); Vt. Stat. Ann. tit. 13, § 3252(a)(1) (2001) (defining sexual assault as compelling participation in a sexual act without consent, with no mens rea mentioned, as exemplified in *State v. Gabert*, 564 A.2d 1356, 1359 (Vt. 1989) (declining to decide whether sexual assault requires a mens rea element)); W. Va. Code § 61-8B-2 (2001) (making lack of consent an element of every sexual offense, but failing to indicate the applicable mens rea, if any); Wis. Stat. § 940.225 (2000) (requiring nonconsent for sexual assault, but not indicating any mens rea, as exemplified in *Brown v. State*, 207 N.W.2d 602, 609 (Wis.

states, the ultimate rule—that is, the mens rea with regard to consent sufficient for conviction after applying the rape statute; the local rules explaining how to apply a generally stated mens rea to each element, or how to ascertain an unstated mens rea; and the applicable mistake rule—remains unclear.[70] Finally, some states simply do not appear to require, or purport not to require, proof of nonconsent at all, rendering the mens rea for such an element irrelevant.[71]

1973) (ruling that rape is not a specific intent crime, but not indicating whether a lesser, general intent applies to the nonconsent element)).

70. *See, e.g.*, N.D. Cent. Code § 12.1-20-03 (defining gross sexual imposition to include compulsion, with no specified mens rea, as exemplified in *State v. Cummins*, 347 N.W.2d 571, 572 (N.D. 1984) (indicating, vaguely, that gross sexual imposition is a crime of general intent, for which the required culpability is "willfully")); Or. Rev. Stat. § 163.375(1) (1999) (defining rape as sexual intercourse in which the victim "is subjected to forcible compulsion," without indication of mens rea); Tex. Penal Code Ann. § 22.011 (Vernon 2000) (defining sexual assault as intentionally or knowingly causing sexual penetration without consent); Anonymous v. State, 507 So. 2d 972, 975 (Ala. 1987) (stating that first degree rape "does *not* require any *specific* criminal intent"); Askew v. State, 118 So. 2d 219, 222 (Fla. 1960) (holding that rape is not a specific intent crime, but not clarifying whether the mens rea of general intent applies to the element of nonconsent); State v. Lopez, 892 P.2d 898, 901 (Idaho 1995) (indicating only that forcible rape "is not a specific intent crime"); Potter v. State, 684 N.E.2d 1127, 1135 (Ind. 1997) (stating that a statutory mens rea of knowledge applied to every element of rape, but only a reasonable, honest mistake about consent may be a valid defense); Malone v. Commonwealth, 636 S.W.2d 647, 647 (Ky. 1982) (opining that the drafters of the Penal Code did not intend "to inject the elements of intent or knowledge . . . into the crimes of forcible rape and sodomy," but not ruling on whether any other mens rea applied to the elements of nonconsent or forcible compulsion); State v. Beishir, 646 S.W.2d 74, 78-79 (Mo. 1983) (discussing conflicting state court opinions and stating in dicta that forcible rape would seem to preclude a defense of unreasonable mistake); Dinkens v. State, 546 P.2d 228, 229-30 (Nev. 1976) (indicating that nonconsent is the essence of rape, but not specifying a mens rea); Winnerford v. State, 915 P.2d 291, 294 (Nev. 1996) (ruling that "[s]exual assault is generally considered a general intent crime," without clarifying what, if any, mens rea is required regarding nonconsent); State v. Calamity, 735 P.2d 39, 43 (Utah 1987) (holding that rape may be committed recklessly, but not specifying whether this mens rea applies only to the act or also to the nonconsent element); State v. Aumick, 869 P.2d 421, 423 (Wash. Ct. App. 1994) (holding that rape does not require the element of intent), *aff'd* 894 P.2d 1325 (Wash. 1995); Bryan v. State, 745 P.2d 905, 909 (Wyo. 1987) (holding that first degree sexual assault is a general intent crime, but not indicating whether any mens rea applies to lack of consent).

Note, however, that if some of the jurisdictions just cited follow the general rule with regard to general intent crimes, a specific intent to have nonconsensual intercourse would not be required, and a defendant would be guilty of rape if he possessed some morally blameworthy state of mind regarding nonconsent. *See* Dressler, *supra* note 12, § 33.05, at 586-87 & nn.100-03. *But see* Bryden, *supra* note 22, at 325 (indicating that all that was required at common law when rape was a general intent crime was an intention to perform the act). Whether this rule results in classifying the required mens rea as recklessness or negligence is still not clear, although at least one commentator has argued that, in practice, there is no real distinction between reckless and negligent rape, *see* Schulhofer, AALS Address, *supra* note 66, and that attempting to distinguish the two obscures the real, and different, issue of what is meant by consent, *see* Stephen J. Schulhofer, *The Gender Question in Criminal Law*, 7 Soc. Phil. & Pol. 105, 132-33 (1990).

71. *See, e.g.*, Okla. Stat. tit. 21, § 1111 (2000) (defining rape as sexual intercourse

2. In *Sansregret*

Much ink was spilled in the *Sansregret* case over the mens rea required for conviction of rape. The trial judge appeared to believe that the required mens rea for commission of rape was knowledge and found Sansregret had not committed rape. She reasoned that "[t]here was no meaningful consent" and that "[t]he apparent consent was [the] result of threats or fear of bodily harm."[72] She found further that "no rational person could have been under any honest mistake of fact" about the absence of true consent or "could have believed that the complainant's dramatic about-face [in first having rejected the defendant and then agreeing possibly to reconcile and have sex with him] stemmed from anything other than fear."[73] Nevertheless, she concluded that Sansregret had indeed believed that all was back to normal between him and the complainant and that he had her consent.[74] "He saw what he wanted to see, heard what he wanted to hear, believed what he wanted to believe."[75] Judge Krindle reached this conclusion not only owing to the defendant's own testimony, but mostly because his assertion was supported by the testimony of the complainant.[76] As the Judge explained, the couple had sat on the bed conversing for about twenty to thirty minutes between the time of his terrorizing her and the act of intercourse.[77] During this period, the complainant, having resolved to do whatever necessary to calm the defendant, told him what he wanted to hear, including that she still cared for him, that they might reconcile, and that there was no other man in her life.[78] When he proposed lovemaking and began to kiss

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"[w]here force or violence is used or threatened"); R.I. Gen. Laws § 11-37-2 (2001) (defining sexual assault as penetration using force or coercion); S.C. Code Ann. § 16-3-652 (Law Co-op. 2000) (defining criminal sexual conduct as sexual battery using "aggravated force," which is defined in § 16-3-651 to include such physical force as to "overcome the victim"); S.D. Codified Laws § 22-22-1 (Michie 2001) (defining rape as sexual penetration through the use of force, coercion, or threats); State v. Kelly, No. C5-94-375, 1994 Minn. App. LEXIS 993, at *2-3 (Minn. Ct. App. Oct. 11, 1994) (holding that the first-degree criminal sexual conduct statute requires only a general intent to do the prohibited acts, and does not mention nonconsent); State v. Jiminez, 556 P.2d 60, 63 (N.M. Ct. App. 1976) ("Absence of consent is not an element of the crime [of rape] as defined by the Legislature," though it was an element of the prior, repealed statute). *Compare* State v. Stull, 338 N.W.2d 403, 406 (Mich. Ct. App. 1983) (ruling that nonconsent is not an element of rape, though evidence of consent may be offered to show lack of force or coercion), *and* State v. Hale, 370 N.W.2d 382, 383 (Mich. Ct. App. 1985) (ruling that the standard jury instructions on third degree criminal sexual conduct implied that the jury must find that the complainant did not consent to sexual intercourse before finding the defendant guilty).

72. R. v. Sansregret, [1983] 22 Man. R.2d 115, 119 (Can.).
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 118.
78. *Id.*

her, she put up no resistance.[79] As Judge Krindle concluded, the complainant "knows him and in her opinion, notwithstanding all the objective facts to the contrary, he did believe that everything was back to normal between them by the time of the sexual encounter."[80] The Judge then pointed to dictum in a then-recent case from the Supreme Court of Canada to opine that such an honest mistake about consent, whether objectively reasonable or not, would absolve the defendant of criminal liability for rape, and she invited the prosecution to appeal the case for guidance as to whether that rule was intended to apply in this particular situation.[81] In short, she reasoned that the applicable rule was that any honest mistake about consent would exonerate, so that knowledge of the absence of genuine consent must be the mens rea required to establish rape.

If the trial judge was wrong and the mens rea required for commission of rape in *Sansregret* had been recklessness, there should have been little difficulty finding that the defendant raped his ex-girlfriend.[82] Recklessness involves both subjective and objective components.[83] Subjectively, the defendant must be aware of the risk that he does not have the victim's consent. Objectively, that risk must be substantial and disregard of it unjustifiable under the circumstances. In *Sansregret*, if the defendant were found to have been aware of the risk that the victim's consent was coerced, the risk would surely have been considered substantial and its disregard unjustifiable. Even though the trial judge, acting as fact-finder, believed that Sansregret was not actually aware of the victim's coerced consent, she nevertheless could more readily have concluded that he was aware of at least the *risk* that his ex-girlfriend was coerced into consenting, as well as of factors that rendered that risk substantial and its disregard unjustifiable.[84] As for the socially normative, objective component of recklessness, it seems wholly unreasonable for Sansregret to have concluded that his ex-girlfriend was freely consenting to intercourse in the face of his outrageous and frightening

79. *Id.* Sansregret specifically asked the complainant whether she wanted to make love, to which she responded "with you dressed like that" or "with you like that." He took this response to mean she was consenting and took off his clothes. He then tried to perform oral sex on her, which she resisted, so he desisted. She did not resist an act of intercourse, but when he suggested a second act she said she had to go to work. He did not insist. *Id.*

80. *Id.* at 119.

81. *Id.* (discussing Pappajohn v. The Queen, [1980] 2 S.C.R. 120 (Can.)).

82. Sansregret v. The Queen, [1985] 1 S.C.R. 570, 582 (Can.) ("There was indeed an abundance of evidence before the trial judge upon which a finding of recklessness could have been made.").

83. *See* Charlow, *supra* note 66, at 1377 and authorities cited therein.

84. This would most likely comprise the subjective portion of reckless disregard. *See id.* at 1379-80 n.130. *But see* Samuel H. Pillsbury, *Crimes of Indifference*, 49 Rutgers L. Rev. 105, 120 n.36 (1996) (arguing that a reckless defendant must actually realize both the great danger of his conduct and its lack of justification).

behavior.[85] Thus, had it been relevant, the trial judge might have found beyond a reasonable doubt that Sansregret acted recklessly with regard to consent.

When the *Sansregret* case reached the Court of Appeal, the Justices disagreed over what the Canadian Supreme Court had previously held was the mens rea for rape. This was because in *Pappajohn v. The Queen*, an earlier case involving nonconsensual rape, the Supreme Court had fragmented on the issue of the defense of mistake of fact.[86] One judge in *Pappajohn*, Dickson, had said that mistake is a defense whenever the defendant honestly believes he has consent or at least does not know he does not have consent.[87] The reasonableness of his belief is only evidence from which to determine whether the belief was actually held, and is not required for the belief to exonerate.[88] Judge Philp, in his dissent in the Court of Appeal decision in *Sansregret*, adopted this view and applied it to the second type of rape, coerced consent rape, that was involved in *Sansregret*. This position on the mistake defense seems to assume that knowledge is the required mens rea for either type of rape. As Judge Philp reasoned, for a mistake to serve as a defense, it must negate the mens rea of the crime.[89] Even an unreasonable mistake about consent will serve as a defense to a rape charge, according to the majority of judges in *Pappajohn*.[90] Ergo, there must be a subjective standard of mens rea regarding consent: as long as the defendant subjectively believes he has consent, whether reasonably or unreasonably, he has a defense.[91] Thus, knowledge of nonconsent or coerced consent—a subjective state of awareness that there is not consent or that it was coerced—is the minimum required mens rea for a rape conviction.

A second judge in *Pappajohn* had agreed with Judge Dickson's statement of the basic mistake in rape rule, but added that there must be some evidence giving the belief in consent an air of reality, or else the mistake defense would not be put before the jury.[92] Judge Matas

85. This would comprise the objective portion of reckless disregard. "The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." Model Penal Code § 2.02(2)(c) (1962).

86. *See* Pappajohn v. The Queen, [1980] 2 S.C.R. 120, 123 (Can.) (opinion of Judge McIntyre); *id.* at 134 (opinion of Judge Martland); *id.* at 137 (opinion of Judge Dickson); R. v. Sansregret, [1983] 25 Man. R.2d 123, 127 (Can).

87. *Pappajohn*, 2 S.C.R. at 149 (Dickson, J., dissenting); *Sansregret*, 25 Man. R.2d at 127, 134.

88. *Pappajohn,* 2 S.C.R. at 156 (Dickson, J. dissenting); *Sansregret*, 25 Man. R. 2d at 127.

89. *Sansregret*, 25 Man. R.2d at 130-31 (Philp, J., dissenting).

90. *Id.* at 131-32 (Philp, J., dissenting).

91. *Id.* at 131 (Philp, J., dissenting).

92. *Pappajohn*, 2 S.C.R. at 128 (McIntyre, J.); *Sansregret*, 25 Man. R.2d 127. For a discussion of the "air of unreality" standard, see Don Stuart, Canadian Criminal Law 259-62 (3d ed. 1995); Williams, *supra* note 11, at 617-18.

in his Manitoba Court of Appeal decision in *Sansregret* seemed to adopt this air of unreality standard. He maintained that there was an air of unreality in allowing Sansregret to claim the mistake defense because his was a case in which the complainant's successful pretense that she was consenting stemmed directly from her fear for her life created by Sansregret himself.[93] This "air of unreality" overlay appears to transform the mens rea required for a rape conviction from knowledge to recklessness. If the mistake about consent must have an air of reality about it, it seems it must be something an average person grounded in reality, presumably just like the judge making the determination, would deem within the realm of what is reasonable. While purporting to abjure the reasonableness requirement for a mistake defense, those judges imposing the air of reality threshold hurdle to get the defense before the jury seem to have reintroduced the reasonableness requirement through the back door—or maybe in this case, since it is a prerequisite, through the front door. If the defendant's mistake about consent must approach an objectively reasonable belief in order to have an air of reality about it, and thus ultimately in order to negate the mens rea of rape, the mens rea of rape could be something less than a strictly subjective awareness (knowledge) of nonconsent or of coerced consent. Rather, the mens rea could also be satisfied by a state of mind that failed an objectively reasonable measure. Therefore, recklessness about consent would also suffice for conviction.[94]

93. *Sansregret*, 25 Man. R. 2d at 127-28.

94. The view that recklessness would suffice was similarly adopted by Judge Huband in the Court of Appeal in *Sansregret*. However, he deduced this by surveying the relevant case law. *Id.* at 128-30 (Huband, J., concurring). A third judge in *Pappajohn* avoided the mistake issue altogether. He determined that it was unnecessary to decide whether the mistaken belief in consent need be reasonable in order to exonerate because the defense was unavailable to the defendant in *Pappajohn* in any event.

One complicating factor in establishing the existence of required mental states that contain subjective elements (e.g., knowledge, recklessness) is the nature of the proof used to substantiate these elements. *See* David P. Leonard, *The Use of Uncharged Misconduct Evidence to Prove Knowledge* 2 (2002) (unpublished manuscript, on file with the Fordham Law Review) (indicating that knowledge must always be proven circumstantially, raising difficult questions about the types of evidence that may be used to establish the fact). Subjective mens rea usually must be proven by inferences drawn from objective evidence, Charlow, *supra* note 66, at 1359-60 (specifically addressing knowledge), a problem in many areas of criminal law, but seemingly exacerbated by the nature of the facts involved and the evidence available in many rape cases. *Pappajohn*, 2 S.C.R. at 134-37 (Martland, J., concurring).

E. *Willful Blindness Regarding Consent*

1. As Applied in *Sansregret v. The Queen*

When the *Sansregret* case reached the Canadian Supreme Court, that court unanimously concluded that, although knowledge of nonconsent or coerced consent effectively was required for the commission of rape,[95] the defendant was nonetheless guilty. The judges opined that Sansregret had willfully blinded himself to the fact that the complainant's consent was coerced.[96] According to a well established rule in criminal law, when one does not "know" a fact required for the commission of a crime because he has willfully blinded himself to awareness of it, the element of knowledge of that fact is nonetheless satisfied.[97] The Supreme Court supported its conclusion with statements from the trial court's opinion that alluded to willful ignorance.[98] For example, Judge Krindle had said that, although no rational person could have been operating under an honest mistake of fact about the reason for the complainant's submission to intercourse, "people have an uncanny ability to blind themselves to much that they don't want to see, and to believe in the existence of facts as they would wish them to be."[99] She also noted that, despite her confidence "in the ability of people to blind themselves to reality," she would have been hard pressed to credit the honesty of the defendant's belief about consent had it not been for the complainant's own testimony supporting his claim.[100] She concluded that he "saw what he wanted to see, heard what he wanted to hear, [and] believed what he wanted to believe."[101] Finally, she solicited guidance from the Supreme Court on whether it intended the mistake rule of *Pappajohn* to apply to "situations where an accused, who demonstrates the clarity and shrewdness this accused showed in securing his own safety at the outset can turn around and because it does not suit his wishes, can go willfully blind to the obvious, shortly thereafter."[102] The Supreme Court used these statements to conclude that Sansregret had acted with willful blindness to the issue of consent. I explore this ruling more fully,[103] but added background

95. I say "effectively" because the court purports to apply a recklessness standard, but then also applies the mistake defense of *Pappajohn*, thereby raising the required mens rea to knowledge. *See* discussion *supra* at Part I.C, notes 58-59 and accompanying text; Part I.D.2.

96. Sansregret v. The Queen, [1985] 1 S.C.R. 570, 583, 586-87 (Can.).

97. *See* Charlow, *supra* note 66, at 1353-54.

98. *Sansregret*, 1 S.C.R. at 583, 586-87.

99. R. v. Sansregret, [1983] 22 Man. R.2d 115, 119 (Can.).

100. *Id.*

101. *Id.*

102. *Id.*

103. *See infra* notes 114-23; discussion *infra* Part I.E.2.

would be helpful first to understand how the Court reached its conclusion regarding willful ignorance.

To begin its analysis, the Supreme Court agreed with Judge Huband that, in the case of coerced consent rape, consent "is assumed from the outset" and the only issue is "whether it was freely given or procured by threats."[104] Therefore, also as Judge Huband had ruled, where the accused asserts an honest belief in consent, the belief must "encompass more than the fact of consent" and must include "a belief that it has been freely given and not procured by threats."[105] Judge McIntyre, writing for the Court, concluded that the mens rea for nonconsensual rape "must involve knowledge that the woman is not consenting, or recklessness as to whether she is consenting or not," and that the mens rea for coerced consent rape is "knowledge that the consent was given because of threats or fear of bodily harm, or recklessness as to its nature."[106] Hence, in accord with and extending the rule of *Pappajohn*, "an honest belief on the part of the accused, even though unreasonably held, that the woman was consenting to intercourse freely and voluntarily and not because of threats, would negate the mens rea [of coerced consent rape] and entitle the accused to an acquittal."[107]

This conclusion is faulty. If recklessness as to consent (for nonconsensual rape) or as to the coerced nature of the apparent consent (for coerced consent rape) is sufficient for conviction, an honest but unreasonable mistake about either the fact of consent (for nonconsensual rape) or its nature (for coerced consent rape) would not necessarily negate the required mens rea and entitle the defendant to an acquittal. While any honest mistake about consent, even an unreasonable one, would negate knowledge of nonconsent or coerced consent, it would not necessarily negate recklessness about consent. If the accused was aware of the risk of nonconsent or the risk that consent had been coerced, and he nevertheless made an unreasonable mistake about the ultimate fact that he did not have consent or that he had coerced consent, he would have made an honest, unreasonable mistake and still have been reckless as to consent. In this circumstance, the defendant could have satisfied both elements of recklessness: subjectively, he was aware of the risk of questionable consent; objectively, the risk that he was making a mistake could have been substantial and unjustifiable, and it most likely was both if his mistake was unreasonable. Hence, an honest, unreasonable mistake about consent would negate a mens rea of knowledge, but it certainly would not necessarily negate a mens rea of recklessness. Thus, by recognizing the honest though unreasonable mistake as a full defense

104. Sansregret v. The Queen, [1985] 1 S.C.R. 570, 580 (Can.).
105. *Id.*
106. *Id.* at 581.
107. *Id.*

to either of these forms of rape, the Supreme Court of Canada effectively transformed the mens rea of rape from recklessness to knowledge.

Having settled on this relatively higher standard for a finding of culpability (though not acknowledging it outright), the Court nonetheless found the defendant guilty on the rape charge. First, Judge McIntyre defined recklessness in the usual way, as "the conduct of one who sees the risk and who takes the chance."[108] Then he noted that, since we would assume that one "who intimidates and threatens a woman and thereafter obtains her consent to intercourse would know that the consent was obtained as a result of the threats," recklessness as to the nature of the consent could easily be attributed to Sansregret, and the case "could have been disposed of on the basis of recklessness."[109] He observed that Judge Krindle did not so dispose of the case because she applied the mistake rule discussed above,[110] pursuant to which a finding of knowledge of coerced consent was essentially required. Although he noted that Judge Krindle was correct about the mistake rule as applied generally in rape, he concluded that it was incorrect to apply the rule given the facts of this case.[111] This is because Judge Krindle also found the defendant to have been "wilfully blind to reality," which would preclude application of the mistake defense.[112] According to the Supreme Court, the defense of honest mistake of fact overrides a finding of recklessness, but "a finding of wilful blindness as to the very facts about which the honest belief is now asserted would leave no room for the application of the defen[s]e."[113]

When it came to the willful ignorance discussion, this is how the Court reasoned: The trial judge was wrong to find that she did not have enough evidence from which to conclude that Sansregret knew of his ex-girlfriend's earlier complaint of rape.[114] Since Judge Krindle

108. *Id.* at 582.

109. *Id.* The Court pointed to "an abundance of evidence" from which a finding of recklessness about consent could have been made, including the complainant's demonstration of her rejection of the accused when she dismissed him from her house the month before after a period of cohabitation; the earlier incident of his breaking into her house and then terrorizing her into consenting to intercourse; her report to the police about the earlier incident, which led to the involvement of his probation officer, who persuaded her to drop her earlier complaint; and the incident of October 15, in which he again broke into her house "and repeated his earlier performance." *Id.*

110. *Id.*

111. *Id.* at 583.

112. *Id.*

113. *Id.* at 584.

114. *Id.* at 582-83. Judge Krindle had observed that Sansregret knew the complainant had complained to the police and therefore "had some awareness that [she] was displeased" with him. R. v. Sansregret, [1983] 22 Man. R.2d 115, 116 (Can.). However, the judge said she "[did] not know whether anyone told the accused that [the complainant] complained of the sexual act as being an act of rape." *Id.* She

could—and indeed, should—have found that Sansregret knew not only of the earlier complaint but also that it was a complaint of rape, the defendant was on notice that the complainant considered a similar episode to be rape.[115] Thus, he was "aware of the likelihood of the complainant's reaction to his threats," so that, when he proceeded to have intercourse with her on the present occasion, after having similarly threatened her, he was engaging in "self-deception to the point of wilful blindness."[116] Willful blindness arises when a person becomes aware of the need for inquiry but declines to make inquiry because he does not wish to know the truth.[117] In such cases, the person is deemed to have knowledge of the fact he has avoided learning.[118] Sansregret fit the parameters of one who has been willfully blind because he had intercourse on the present occasion despite his knowledge that his partner considered an earlier act of intercourse under similar circumstances to be rape.[119] Hence, Sansregret, willfully blind to the fact that he had coerced his ex-girlfriend's consent on the present occasion, is presumed to have knowledge of the coerced nature of her consent.[120] Because he is deemed to have knowledge of the fact of coerced consent, he cannot avail himself of the defense of mistake of fact about this element.[121] His "honest belief" in genuine consent amounts to nothing more than "no specific knowledge to the contrary." It cannot serve as a defense for someone who has deliberately avoided knowing that he does not have genuine consent.[122] Thus "fixed by law with actual knowledge[,] . . . his belief in another state of facts is irrelevant."[123]

2. As Misapplied in *Sansregret v. The Queen*?

Did the Court correctly apply the doctrine of willful blindness to these facts? At the outset, the Court's explanation of its disposition of

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concluded that, if there had been any evidence "that the accused was aware on October 15th that the complainant had considered the sexual relations of September 23rd, 1982 to have been nonconsensual, [she] would have rejected [the mistake] defence out of hand," but there was "no such evidence." *Id.*

115. *See* Sansregret v. The Queen, [1985] 1 S.C.R. 570, 582-83 (Can.).

116. *Id.* at 587. The Court noted that one could not really infer willful blindness based solely on the events of October 15, 1982, and that Judge Krindle was correct to have declined to do so. *See id.* Those events would only establish that Sansregret *should have known* the complainant was consenting out of fear, *see id.*, presumably because a reasonable person in the circumstances would have known. To assume willful blindness under those circumstances would be to apply essentially a negligence standard.

117. *Id.* at 584.

118. *Id.* at 585-86.

119. *See id.* at 587.

120. *Id.*

121. *Id.* at 587-88.

122. *Id.*

123. *Id.*

the evidentiary issue supporting the finding of willful ignorance is unconvincing. Judge McIntyre, writing for the Court, ruled that willful ignorance of the fact that consent was coerced during the October incident could be inferred because the defendant had been aware that the similar September incident was reported as a rape.[124] Judge McIntyre seems to be implying that the report of rape indicated that the complainant was in fact not genuinely consenting in September when she appeared to be agreeing to intercourse after the defendant had terrorized her. Thus, if the defendant knew of the report, presumably he was aware that when his ex-girlfriend appears to acquiesce to sex following his terrorizing behavior there is a very strong probability that her consent is coerced. Taking this inference one step further, if, in October, the defendant terrorizes his ex-girlfriend and then has intercourse with her, knowing that in a prior, similar situation she considered her consent to have been coerced, he is being willfully blind to the fact that her consent is coerced at that later time as well.

There are a couple of issues raised by, as well as a factual problem with, this analysis. First, imbedded in this reasoning is the assumption that the complainant's description of the first episode as a rape means that her consent at that time was indeed coerced. This may be an appropriate or correct assumption, but we should recognize that it embodies a subjective standard regarding consent—that is, consent is coerced if the complainant believes or says it is. While nonconsent usually is determined according to the complainant's subjective assessment, this proposition is not uncontroversial.[125]

Second, there is a disconnect between Judge McIntyre's definition of willful blindness and his application of it on these facts. As the Judge explains it, "wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant."[126] In the Judge's words, culpability in willful blindness "is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry."[127] If this is the operative definition of willful ignorance, it is awkward to apply it to the *Sansregret* facts. Inquiry seems a perverse concept to introduce in this case. What inquiry should Sansregret have made to have ascertained whether consent was coerced in October? Suppose he had come right out and asked the complainant whether she was genuinely consenting to have sex with him despite his preceding violent behavior. Would she have answered anything other than the sincerest affirmation she could manage to muster, in order to save her

124. *See supra* notes 114-23 and accompanying text.
125. *See* Wertheimer, *supra* note 49, *passim*.
126. *Sansregret*, 1 S.C.R. at 584.
127. *Id.*

life? Suppose he had asked her to sign an affidavit swearing that she was consenting. Presumably she would have signed it, all the while assuring him she meant every word. By her own admission, she was doing her best to make him believe that she cared for him and was receptive to him. Under those circumstances, no inquiry would suffice to allay the possibility of feigned consent.

The problem seems to be that willful ignorance is designed for situations in which inquiry would reveal the truth. One who could readily ascertain the truth but for deliberately avoiding it is charged with knowing what he would have known had he not avoided knowledge. But Sansregret apparently could not have readily ascertained the truth by inquiring. His failure to comprehend the reality about consent seems to stem from something other than his turning his back on what would have been obvious upon a simply query. We might describe his failure to understand as willful ignorance in the colloquial sense of the phrase, that is, he probably did not want to know whether he might have coerced consent, and in that sense was "willfully" ignorant. However, it does not appear to fit the technical term of art as defined by the Canadian Supreme Court in this case. This could mean it should not be considered willful ignorance, or that willful ignorance should be redefined to encompass Sansregret's situation.[128]

Despite his description of willful ignorance in the usual criminal law terminology, it seems Judge McIntyre was not really concerned with inquiry at all. Rather, he is really saying that no inquiry on Sansregret's part could have remedied the attribution of willful blindness, because the accused proceeded to have intercourse with the complainant on the second occasion knowing of the earlier complaint of rape. This is tantamount to saying that, once Sansregret is aware of the risk that his violent threats will result in coerced consent to intercourse, he is presumed to know he does not have consent whenever he has intercourse following violent threats. Surely such a defendant is reckless about consent, but is he also willfully ignorant? Not, as we have seen, according to Judge McIntyre's own description of willful ignorance. Possibly also not according to what ought to be considered willful ignorance, but I return to that point below.[129]

Third, and most basic, the trial judge, Judge Krindle, had found insufficient evidence that the defendant knew the complainant's September complaint had involved a charge of rape. The Supreme Court disagreed, but it seemed simply to assert this fact without much in the way of evidence to support it.[130]

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128. For a suggestion to reconfigure willful blindness to cover this case, see Mark McElman, *A New Conception of Wilful Blindness: The Supreme Court of Canada's Decision in* R. v. Sansregret, 9 Dalhousie J. of Legal Studies 324 (2000).

129. *See infra* notes 136-51 and accompanying text.

130. *See Sansregret*, 1 S.C.R. at 582-83. The court noted the following facts: 1) the

Putting aside these preliminary hurdles, did the Supreme Court correctly apply the doctrine of willful blindness to the facts as the high court found them? To answer this requires a greater understanding of the doctrine. Criminal law has long accepted the common law notion that one who deliberately avoids learning the truth of some matter can be charged with knowing it.[131] The essential purpose of the doctrine appears to be to inculpate those who connive to avoid responsibility by intentionally closing their eyes to otherwise obvious facts. The concept of willful ignorance is defined in different ways by different courts.[132] These definitions generally fall within three broad categories, including those based on the Model Penal Code, on willfulness, and on recklessness.[133] The differences make it difficult to generalize about the culpability of willfully ignorant behavior, specifically, to determine whether it meets or sufficiently approximates that of knowledge. This is important because willful blindness is employed as a substitute for a requirement of knowledge, a practice that can be considered acceptable only if the two are comparably culpable. Most often these definitions delineate a mens rea that is not quite the equivalent of knowledge or of recklessness, and that falls somewhere in between the two in terms of culpability.[134]

As it was originally employed, the doctrine was used as a knowledge substitute only for regulatory and other relatively non-

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complainant complained to the police about the September incident but was persuaded not to pursue the matter by Sansregret's probation officer; 2) the defendant knew the complainant had made a complaint to the police about this incident and knew his probation officer had called the complainant about the incident and intervened to prevent her from pursuing charges; 3) the defendant knew that he was not welcome in the complainant's house and knew "of her attitude towards him"; 4) both the defendant and a police officer testified that, when the defendant was asked why he ran from the police after the October incident, he said "[because of] that time she 'phoned the police on me before,'" although Sansregret later denied this on cross examination. It is difficult to understand exactly what part of this evidence could have led to a finding that Sansregret knew the specific nature of the September complaint. Where among these facts is the complainant's allegation of a *rape,* let alone the defendant's awareness of it? To support a finding of his willful blindness to the coerced nature of the consent on the second occasion, presumably Sansregret would have had to have been aware that the complainant considered her consent to have been coerced or less than genuine on the earlier occasion, so that her signals of consent the second time around were similarly suspect. Clearly the defendant knew she had objected to his September behavior and considered it sufficiently unlawful to involve the police. But it is a long way from "I ended my relationship with the defendant and he then did something unlawful when he broke into my house and terrorized me," to "when I had intercourse with him after he broke into my house and terrorized me, my consent was coerced and not genuine."

131. Charlow, *supra* note 66, at 1353-54.

132. *Id.* at 1366.

133. *Id.* As I have explained elsewhere, even these three categories of definitions can be further subdivided into pure, mixed disjunctive and mixed conjunctive forms. *Id.* at 1366-67. It is not entirely clear which of these formulations Judge McIntyre was using in his *Sansregret* decision.

134. *Id.* at 1382-1400.

serious offenses.[135] In virtually every early application, there were also special indicia of heightened culpability.[136] Courts focused first and foremost on the deliberateness of the defendant's effort to avoid learning or confirming the truth.[137] Even when the defendant had purposefully avoided the truth, courts did not usually apply the doctrine unless there was also an additional factor that contributed to the culpability of the behavior involved.[138] Early cases exemplify two such special culpability factors: 1) a motive to further or permit someone else's illegal act[139] and 2) avoidance of knowledge where the defendant has an express or implied duty to ascertain the truth of the fact avoided.[140] More recent cases identify a third attribute indicative of heightened culpability: an "obstructionist" purpose, that is, a motive to remain ignorant in order to avoid the criminal consequences of acting with positive knowledge.[141]

I have argued elsewhere that, if willful ignorance is to be used as a wholesale knowledge substitute and is not restricted to cases exhibiting these special culpability factors, it should be defined in such a way as to approach more closely the culpability of knowledge.[142] Thus, one should be charged with knowledge based on his willful ignorance only if he: 1) has very good information that some fact exists that makes what he is doing wrong;[143] 2) comes very close to believing that the fact exists;[144] and 3) intentionally avoids establishing whether the fact exists[145] 4) for an evil, dangerous, or otherwise highly improper reason, that evidences an especially high level of criminal callousness.[146] While one may take issue with this specific formulation of willful blindness,[147] the general notion that the mental state must be distinguished from recklessness in terms of its culpability, and that its culpability should closely resemble that of knowledge if it is to substitute for knowledge, remain valid points.[148]

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135. *Id.* at 1400-01.
136. *Id.* at 1400-13.
137. *Id.* at 1401.
138. *Id.*
139. *Id.* at 1401-03 (describing the "connivance" cases of willful blindness).
140. *Id.* at 1401, 1403-10 (describing the "duty to know" cases of willful blindness).
141. *Id.* at 1401, 1410-13 (describing the "obstructionist purpose" cases of willful blindness).
142. *Id.* at 1357, 1429.
143. *Id.* at 1414-15 & n.260.
144. *Id.* at 1415-16.
145. *Id.*
146. *Id.* at 1415-17.
147. *Cf.* Douglas N. Husak & Craig A. Callender, *Wilful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 Wis. L. Rev. 29 (arguing that willful blindness, however defined, should not be used as a knowledge substitute because to do so violates the principle of legality). I am not certain I would now suggest defining willful blindness exactly as I had over a decade ago.
148. *See* Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal*

Does this view of willful ignorance indicate that the concept was correctly or incorrectly applied to Sansregret? As for the first element, one might conclude that the defendant had very good information that some fact existed that would make what he was doing wrong. His awareness that he was threatening and frightening his ex-girlfriend is good information that the fact existed that he was coercing her consent to a subsequent unwelcome act of intercourse. Moreover, if we accept the factual finding of the Supreme Court that he knew he had coerced consent on a previous occasion by acting in a similar fashion, then surely he had such good information as to put him on notice that he was now, again, coercing consent.

It also does not seem difficult to establish the last component of this formulation of willful blindness, the defendant's culpable reason for having been willfully ignorant, that is, the special culpability factor that raises the level of his overlooking the obvious above that of reckless behavior. Assuming Sansregret had deliberately ignored what he appreciated to be the significant risk of coerced consent, it would appear easy to find that he had an especially callous reason for doing so—in order to achieve intimacy with the complainant while avoiding criminal liability for having coerced sex. This would be precisely the type of obstructionist purpose demonstrated in the substantial body of case law on willful ignorance that characterized the original development of the concept.[149] The defendant deliberately avoids learning or confirming a fact in order to have his way without criminal repercussions. This is "core" willful ignorance.

Whether he came very close to believing that he was coercing consent is a much more difficult issue to resolve. If, as the complainant verified and the trial judge noted, he was quite adept at deceiving himself about his ex-girlfriend's feelings for him, especially, as the trial judge implied, when it served his interest to do so, then maybe he never even came close to believing that her consent was coerced. Perhaps he honestly believed all along that as he spoke with her on the bed she was coming back around to admitting she still cared for him, which she then confirmed by agreeing to have

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Mens Rea, 81 J. Crim. L. & Criminology 191 (1990) (maintaining that it is unconstitutional to substitute willful ignorance for a statutory requirement of knowledge because it is merely recklessness and not knowledge); Husak & Callender, *supra* note 147, at 36 (stating that the purpose of the doctrine of willful ignorance—inculpating some who lack knowledge for a knowledge-level crime—is best served when the concept is described "by a mental state that is not a kind of knowledge but can plausibly be construed to be the moral equivalent of knowledge"); Comment, *Willful Blindness as a Substitute for Criminal Knowledge*, 63 Iowa L. Rev. 466, 466-67, 472-73 (1977) (arguing the unconstitutionality of using willful blindness as knowledge because it is not knowledge). *But see* Husak & Callender, *supra* note 147, at 36 (arguing that willful ignorance should never be used as a knowledge substitute because such a practice violates the principle of legality).

149. For examples of obstructionist purpose cases and discussion of the development of this body of law, see Charlow, *supra* note 66, at 1410-12 & nn. 247-51.

intercourse. The obvious problem is that it does not seem possible to determine whether he satisfied this condition. The difficulty in assessing this factor could mean that the proposed test for willful ignorance is not a good one, because it might not cover a situation like this, in which, perhaps, one ought to find that the defendant was willfully blind to the truth. Maybe requiring proof that the defendant "almost believes" the fact he is avoiding learning is asking too much. Perhaps it ought to be enough that he satisfy the first factor, that is, have very good information that he is deliberately overlooking in favor of ignorance.

But even if we were to discard the "almost believes" factor as unworkable, there remains a problem with satisfying the third factor, the one alluded to in Judge McIntyre's definition for the Canadian Supreme Court, the willfulness or deliberateness of the defendant's ignorance, that is, his having engineered his less-than-knowing state of mind. This element ought more definitely to be a part of any description of willful blindness, as it encompasses the willfulness of the ignorance, and thus, is a major component of what makes the behavior culpable.[150] Just as it was difficult to ascertain whether Sansregret almost believed consent was coerced, it seems equally difficult to discern and demonstrate whether Sansregret deliberately ignored the obvious, or, never even appreciated its obviousness sufficiently to form a deliberate intent to avoid the fact. Exactly how delusional was he? On the one hand, maybe he deliberately avoided learning whether he was coercing consent, or, on the other hand, maybe he simply did not understand or accept that he could not erase the effect of the terror he had created so soon afterward and while still in the same fear-filled setting. Was he as culpable as someone who actually knew he had coerced consent, or only as culpable as someone who was reckless (aware of the risk of coerced consent) or perhaps even only negligent (i.e., not aware of the risk) about having coerced consent?

More importantly, why should it make a difference? It seems somewhat ludicrous to be asking these questions in this instance. Shouldn't Sansregret be guilty of rape even if he did not satisfy the requirements of knowledge or willful blindness? Following the decision, one Canadian writer suggested that the concept of willful blindness be reformulated to cover Sansregret's situation.[151] Indeed, the law of rape has changed so that a subjective but unreasonable mistake about consent would no longer usually suffice to absolve the defendant of liability.[152] In other words, recklessness or something less, as opposed to knowledge, has now truly become the minimum required mens rea for a rape conviction in most jurisdictions.

150. *See id.* at 1400-01.
151. *See* McElman, *supra* note 128.
152. *See* discussion *supra* Part I.D.1.

But changes in the law of rape have not erased the more general problem that *Sansregret* illustrates with regard to the mens rea of crimes requiring knowledge. When other knowledge-level crimes are involved, situations will arise in which traditional definitions of mens rea do not fit what seem to be compelling cases for liability. In some instances, willful blindness might apply, but in others, as in *Sansregret*, it will not. And even when knowledge or willful blindness do apply, it may be too difficult to prove the existence of these subjective states of mind. Should the law in these situations be changed to eliminate the knowledge requirement altogether, as was done with regard to consent in rape? Should willful blindness be redefined to cover the offending situation, as was suggested following *Sansregret*? Or, is there some other appropriate resolution, maybe involving reconceptualizing criminal mental states altogether? These more general questions relate to the whole of criminal law and are not specific to rape. Recent scholarship in the areas of mental states and criminal culpability, even some that does not deal with these questions directly, may help to answer them.

II. NEW THOUGHTS ON OLD DOCTRINES

In this section, I examine three options for inculpating offenders who lack knowledge of some fact necessary for conviction of the crime that their behavior seems to implicate. Theirs are the so-called "bad acts in search of a mens rea." First, I consider whether this phenomenon of noncriminal bad acts means that knowledge may be an inappropriate mens rea altogether. It has proved to be an unpopular choice in the context of rape. The next section discusses the rationales for selecting different, lesser mens rea requirements for rape, and then explores whether these or similar arguments apply to other knowledge-level crimes. I use as examples the federal drug offenses, because they account for such a large proportion of federal convictions, and the "bad check" category of fraud offenses, because they are of relatively recent origin, ubiquitous at the state level, and possibly a good counterexample to rape and drug crimes when it comes to mens rea justifications. Although eliminating the knowledge requirement seems an easy remedy, I ultimately conclude that there are crimes for which knowledge appears to remain an appropriate culpable mental state. For some offenses, such as drug crimes, the knowledge element might be reduced or used along with other mental states as part of a more involved grading scheme. But for other offenses, such as property crimes, these seem unappealing alternatives.

A. *Eliminate the Mens Rea of Knowledge*

The simplest possible resolution of the dilemma posed by having to prove knowledge when it does not exist might be to eliminate the knowledge element. As noted, this is essentially what occurred with regard to the law of rape in those jurisdictions in which knowledge of nonconsent or coerced consent had previously been required. Is the rape example one of universal applicability, and would it remedy the problem of inculpating Sansregret?

The short answer to the universality question is "No." The requirement of knowledge of nonconsent was controversial in the rape context from the time it was announced by the House of Lords in the *Morgan* case [153] in 1975.[154] Moreover, at least in the modern era, it was never universally the rule, as different jurisdictions followed different, often lesser, mens rea standards. Finally, scholarship on the subject of rape over the last twenty or thirty years not only called into question the appropriateness of requiring knowledge of nonconsent to prove rape, but sometimes even went so far as to suggest that no culpable mental state requirement should attach to the element of nonconsent in rape, making it essentially a strict liability offense.[155] In short, for more than a generation, rape in particular has been the subject of sustained, emphatic, and widespread examination and reexamination,[156] especially including debate over the proper mens rea requirement.[157] The same cannot be said of most, if not all, other crimes containing a significant knowledge requirement.

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153. Dir. of Pub. Prosecutions v. Morgan, 1976 A.C. 182 (H.L. 1975) (appeal taken from C.A.).

154. Sanford H. Kadish & Stephen J. Schulhofer, Criminal Law and Its Processes: Cases and Materials 322-23 (6th ed. 1995) (noting controversy over *Morgan*); LaFave, *supra* note 14, § 7.18(e), at 761 ("[T]he commentators have not been kind to *Morgan* ('notorious,' 'shocking' and 'shameful' are among the adjectives used in describing the case.")).

155. LaFave, *supra* note 14, § 7.18(e), at 760 (outlining basic arguments for a strict liability standard with regard to nonconsent); Lynne Henderson, *Rape and Responsibility*, 11 Law & Philosophy 127, 154 (1992); *accord* Dressler, *supra* note 12, § 33.05, at 587 ("[A] number of American jurisdictions have ruled that even a defendant's *reasonable* mistake of fact regarding the female's lack of consent is *not* a defense."); *see also* Schulhofer, *supra* note 12, at 284 (proposing a model rape statute in which criminal negligence regarding consent can result in conviction for a felony). *But see* Dressler, *supra* note 12, § 33.05, at 587 ("If a male genuinely *and reasonably* believes that the female is consenting, then he is acting without moral culpability. The effect of dispensing with the reasonable-mistake-of-fact doctrine is, effectively, to convert rape, a felony carrying severe penalties, into a strict liability offense."); *accord* Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform,* 46 Clev. St. L. Rev. 409, 433 (1998) ("It is wrong to use the bludgeon of the criminal law to impose rules intended to change cultural attitudes when this means punishing an individual for rape who made a mistake that the community . . . would characterize as reasonable.").

156. *See* LaFave, *supra* note 14, § 7.18 (b), at 754-55 (describing the intense public controversy over rape in "more recent times").

157. *See generally* Bryden, *supra*, note 22, at 323 (surveying "the scholarly effort to

But we ought not to dismiss the lesson learned from the rape revolution simply by observing that a similar revolt has not taken place in other areas of criminal law. After all, if knowledge was the wrong requirement for nonconsent in rape, maybe it is also the wrong requirement for other crimes that have not caught the popular attention, but that nevertheless are equally deserving of reform. To explore this possibility, it would be useful to understand why knowledge was the wrong requirement for rape, and actually the antecedent question of why knowledge was required in the first place for conviction of rape, or of any other crime. The reasons undoubtedly differ from crime to crime. Moreover, sometimes—actually, often—they may not have been overtly explained by the crime-defining authorities, and so must be surmised in retrospect.

Let's begin with rape. Why was knowledge ever considered an appropriate mens rea with regard to nonconsent? Rape is a very serious offense, for which potentially substantial prison sentences are either required or permitted.[158] At the same time, the criminal act involved in a rape—intercourse—is one that is usually wholly innocent, *if* accomplished *with* consent.[159] This act most often takes place in a setting in which there are no witnesses, beyond the two participants, who might confirm or refute allegations of nonconsent or the reasonable appearance of consent.[160] Finally, the dynamics of intimate social interaction between the sexes, in which one's desires may be mixed and are frequently unspoken, only adds to the complexity of the problem, as it often may not be clear whether or not sex is desired.[161] In such a situation, it is quite possible, sometimes

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redefine rape," including reexamination of the mens rea).

158. Dressler, *supra* note 12, § 33.02[C], at 571 ("[R]ape is treated as a very serious—often the most serious—non-homicide felony.... [M]ost states set the maximum penalty at life imprisonment or a substantial term of years."); *id.* § 33.03[B][1], at 574 ("[R]ape is considered a serious offense in all states."); LaFave, *supra* note 14, § 7.21(e), at 788 ("The offense of rape has always been subject to very high penalties in this country," for a long time including the death penalty.). *See, e.g.*, N.Y. Penal Law § 130.35 (McKinney 1998) & § 70.02(3)(a) (McKinney Supp. 2000) (classifying first degree rape as a Class B felony and authorizing five to twenty-five years imprisonment for such felonies).

159. *See* LaFave, *supra* note 14, § 7.21(b), at 784 (describing rape as "premised on conduct that under other circumstances may be welcomed by the 'victim'" (quoting Model Penal Code § 213.6 cmt.6 (1980))); Schulhofer, *supra* note 12, at 279 (explaining that focus on the force element in defining rape is misplaced because "many of the... physical aspects of sexuality... are expected and pleasurable, provided that there is consent"); Note, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 Va. L. Rev. 1500, 1503 (1975) ("[Rape] is the only form of violent criminal assault in which the physical act... may, under other circumstances, be desirable to the victim.").

160. Wertheimer, *supra* note 49, at 559 (noting that "sexual relations typically occur in private").

161. *See* Model Penal Code § 213.1 cmt. 4 (1980) ("The deceptively simple notion of consent may obscure a tangled mesh of psychological complexity, ambiguous communication, and unconscious restructuring of the event by the participants.");

even reasonable, to make a mistake about consent. The issue then becomes who should bear the burden of mistake. Given the high stakes entailed in a rape conviction, coupled with the understandable room for error about consent, it made sense for some authorities to have required knowledge of nonconsent.[162] Perhaps the thinking was that a defendant ought not to face spending the bulk of his adult life in prison unless he was actually aware that he did not have his partner's consent to intercourse, even if he was aware that protestations of nonconsent might mean that there was, indeed, a risk of no consent.

Whatever the wisdom of the old knowledge requirement, we have now essentially come to think differently about the balance of equities involved in rape. Proponents of rape reform focused the spotlight on the other side of the scales, that is, the serious invasion of bodily and psychological integrity that occurs in rape.[163] They argued the necessity for and ease of obtaining clarification about consent, given the substantial interest in avoiding a mistake.[164] Analogies were

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LaFave, *supra* note 14, § 7.20(a), at 774-75 (discussing arguments for and against a "no means no" rule regarding consent, including consideration "of the complex dynamics attending sexual activity between acquaintances, the circumstance most often giving rise to the issue of how silence should be interpreted"); Douglas N. Husak & George C. Thomas III, *Date Rape, Social Convention, and Reasonable Mistakes,* 11 Law & Philosophy 95 (1992) (exploring how mistakes of fact about consent can occur); Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond,* 11 Law & Philosophy 35, 41-45 (1992) (discussing a "no means no" standard and the difficulty of determining consent in a variety of factual situations); *id.* at 59-68 (discussing how we determine consent when, "in the messy, emotionally ambiguous real world of dating, petting, and sexual exploration, 'no' *doesn't* always mean no"); *id.* at 259-60 (citing studies showing that "no" does not always mean no) (1992); Wertheimer, *supra* note 49, at 559 (noting that participants in sexual relations may have different perceptions of the events).

162. One proposed reform of rape law is to provide for gradations of rape, with different penalties attaching depending on the level of the defendant's mens rea regarding consent. *See* Schulhofer, *supra* note 12, at 283-84 (proposing a model statutory scheme with lesser crimes of negligent sexual assault and abuse).

163. *See* Dressler, *supra* note 12, § 33.03[A][2] (describing rape as "a crime of violence," "a sexual invasion" in which a woman's "'private, personal inner space' is violated," "an internal assault, an assault on [a woman's] psyche, and a violation of [her] privacy," an act that "denies the woman autonomy," and "a hostile, humiliating, degrading act"); LaFave, *supra* note 14, § 7.18(b), at 755 (classifying rape as a crime against the person, intended to protect the female's freedom of choice); Schulhofer, *supra* note 12, at 276 ("[T]here is no reason to doubt that for the great majority—especially among women—the right to choose or refuse intimacy, and to do so freely, without coercive pressure or constraint, is among the most precious components of personal freedom."); McElman, *supra* note 128, at 331 (stating that feminists believe that subjective determination of guilt in rape inappropriately "sacrifices women's interest in the security of their bodies to the liberty interests of male accused").

164. *See* Toni Pickard, *Culpable Mistakes and Rape: Relating Mens Rea to the Crime,* 30 U. Toronto L.J. 75, 77 (1980) ("There can be little doubt that the cost of taking reasonable care is insignificant compared with the harm which can be avoided through its exercise: indeed, the only cost I can identify is the general one of creating some pressure towards greater explicitness in sexual contexts. To accept an honest but unreasonable belief in consent as a sufficient answer in these circumstances is to countenance the doing of a major harm that could have been avoided at no

drawn to other crimes of bodily or possessory integrity in which the onus is on the invader to establish good reason for the invasion, rather than the other way around.[165] These and other arguments caused formerly knowledge-requiring jurisdictions to recalibrate the scales, so that the burden of at least unreasonable mistake about consent in rape now falls on the accused.[166]

Can an analogous case be made, for example, for drug crimes (manufacture, distribution, possession, and importation), so that knowledge can be eliminated there as well? Possibly. These crimes usually require the actor's knowledge that he or she is dealing with a narcotic or other regulated or prohibited drug.[167] In this context, why was it and does it continue to be thought insufficient for criminal culpability to have been reckless about the nature of what one manufactured, distributed, possessed, or imported?[168] Like rape, these are crimes carrying potentially very significant prison terms, terms that seem only to be increasing as mandatory minimum sentences are superimposed on existing statutory punishments.[169]

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appreciable cost."); Schulhofer, *supra* note 12, at 99-100 (explaining that physical coercion is not required for criminal law redress of property invasions, though sexual autonomy is treated differently); *id.* at 272 ("The legal standard must move away from the demand for unambiguous evidence of [a woman's] protests and insist instead that the man have affirmative indications that she *chose* to participate.").

165. *See* Dressler, *supra* note 12, § 33.04[B][2][b], at 583-84 (justifying the holding of a case requiring affirmative permission for sex by analogy to theft); LaFave, *supra* note 14, § 7.20(a), at 775 (explaining that only in rape is the "default" position that consent exists, while in other areas of law consent to an invasion of the victim's interests must be affirmatively established).

166. If an honest but unreasonable mistake about consent no longer suffices to exonerate, the required mens rea cannot be knowledge of nonconsent and must be recklessness (awareness of a risk of nonconsent about which a reasonable person would not make a mistake) or something less (e.g., negligence—making a mistake about consent that a reasonable person would not make, but without even the awareness of the risk of the mistake). *See* discussion *supra* notes 56-57 and accompanying text. *But see* Berliner, *supra* note 40, at 2706 (concluding that the reasonable mistake defense "has developed into a common law loophole" that operates to reintroduce the discarded notion of victim resistance, thus making it more rather than less difficult to convict in some rape situations).

167. *See supra* note 13 for citations to the relevant federal drug laws.

168. Despite substantial research into the current federal drug laws and their historic antecedents, I have been unable to find any material explaining why Congress actually chose knowledge, as opposed to some lesser standard such as recklessness, as the mens rea for these crimes. The analysis that follows in the text is based on conjecture. *Cf.* United States v. Ekwunoh, 888 F. Supp. 364, 367 (E.D.N.Y. 1995) (commending *People v. Ryan*, 626 N.E.2d 51 (N.Y. 1993), for its conclusion that a defendant is not deserving of an enhanced punishment for possessing a greater quantity of drugs unless he is aware that he possesses the greater quantity because this knowledge requirement avoids "over-penalizing someone who unwittingly possessed a larger amount of a controlled substance than anticipated" and therefore did not act in the "more repugnant" and more socially threatening way contemplated by the legislature in the enhanced penalty provision).

169. *See* Norman Abrams & Sara S. Beale, Federal Criminal Law and its Enforcement 278-79 (3d ed. 2000) (noting mandatory minimum sentences of ten years

Also, perhaps the very idea of such crimes is to target only those who are aware that they are dealing with certain illegal drugs. For example, in the case of possession or importation, while it may be reckless, stupid, and irresponsible to have in one's possession or to bring into the country a package with unknown but maybe suspicious contents, it may seem too harsh to hold people who might have foolishly done so—as a favor to a friend, for example—to the same heavy penalty as those who knew that the package they carried contained narcotics.[170] Added to this is the ambiguity of the physical evidence in many drug cases, consisting of the invisible contents of a closed package.[171] As in the case of rape, perhaps this ambiguity creates a greater danger that understandable, even reasonable, mistakes may be made about the contents of what one carries. Or, perhaps such evidence gives rise to the fear that juries will too easily assume that a defendant is reckless, aware at least of the risk that a package in his possession contains drugs, when there often will be no evidence indicating whether he was or was not aware of such a risk.[172] All these factors might contribute to the perception that imposing long prison sentences on individuals who may have possessed or imported such ambiguous items only recklessly, without proof of actual awareness of the nature of their illegal contents, is simply too severe.

On the other hand, to play devil's advocate, setting the required mens rea for drug-related crimes at recklessness rather than knowledge would not create a blatantly obvious injustice.[173] Only one

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for a first offense and twenty years for a second offense under the primary federal drug statute, in addition to other new civil and criminal penalties enacted in the 1980s).

170. This could be analogous to the rationale for knowledge as the mens rea of rape, that it may have seemed too harsh to hold for rape someone who, however stupidly or foolishly, thought he had consent for intercourse even though aware there was good reason to believe he did not. *See supra* notes 159-63 and accompanying text; *cf.* H.R. Rep. No. 107-306, at 5-6 (2001) (explaining congressional inclusion of a mens rea of "intent to convey false . . . information" in the Anti-hoax Terrorism Act of 2001 as stemming from the desire to protect "innocent or inadvertent behavior" from criminalization).

171. This could be analogous to the difficulty of proof in rape situations, where there usually are no other witnesses or objective evidence beyond the conflicting testimony of the two people involved, and where interpretation of sometimes subtle, unspoken communication is at issue. *See supra* notes 161-62 and accompanying text.

172. Setting the mens rea at knowledge rather than recklessness would at least require the prosecutor to prove beyond a reasonable doubt that the defendant actually knew what was in the package, and not simply that he was aware of a *risk* that the package contained drugs.

173. *See, e.g.*, Husak & Callender, *supra* note 147, at 63 & n.133 ("Statutes proscribing drug possession . . . are the prime candidates for modification [from a mens rea of knowledge to recklessness.]"). When I say there would not be a "blatantly obvious injustice" in switching the mens rea, I do not mean that I necessarily think this is the best, or even a particularly good, outcome. Rather, I mean that an argument analogous to the one already made in the rape context is not

who was reckless, that is, to take the example of importation, *was aware of the risk that he was carrying narcotics across the border*, where that risk was *substantial and unjustifiable* (and maybe he would even need to be aware that it was substantial and unjustifiable[174]), would be liable for the potentially onerous penalty. Those who favor harsh drug laws often point to the serious ill effects of drug use and addiction on individual users and the wide-ranging societal scourge of drugs, including associated violent activity.[175] Also, as in the case of rape, it would often be relatively easy for someone faced with ambiguous evidence of the fact in issue (the closed parcel) to clarify the matter (ask about or inspect its contents). If one considers these countervailing equities in the drug context that are arguably analogous to those in the rape context, the reluctance to embrace reckless individuals under the umbrella of drug offenses is not crystal clear.[176] Moreover, as in the rape context, in order to avoid claims of unjust harshness, it would also be possible to provide gradations of drug offenses based on mens rea, reserving the most serious penalties for those with positive knowledge and imposing lesser punishments on those who act recklessly.[177] In short, perhaps drug offenses are not the best counterexample, one in which the need for or desirability of a knowledge-level mens rea is entirely secure.

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clearly inapt.

174. *See supra* notes 83-85 and accompanying text.

175. *See, e.g.*, 21 U.S.C. § 801(2) (2001) ("The Congress makes the following findings and declarations: . . . The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people."); Harmelin v. Michigan, 501 U.S. 957, 1002-03 (1991) ("Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime. . . . Studies . . . demonstrate a direct nexus between illegal drugs and crimes of violence."); *id.* at 1022 ("Drugs are without doubt a serious societal problem. . . . Unlike crimes directed against the persons and property of others, possession of drugs affects the criminal who uses the drugs most directly," and creates a "ripple effect on society" through "lost productivity, health problems, and the like.") (White, J., dissenting); Alison Bass, *Substance Abuse Trend Worries Health Officials*, Boston Globe, Oct. 19, 1995, (Metro/Region), at 1 ("Substance abuse has far-reaching effects on the health and economic well-being of many Massachusetts residents, even those who do not use drugs themselves," according to the state commissioner of public health; "[S]ubstance abuse . . . is a major factor in the spread of AIDS, health problems among newborn babies, violence, auto fatalities and costly hospital emergency room visits," according to a report prepared by a Washington think tank analyzing local and national studies covering 1988-1994.). A word of disclaimer: I am not personally taking a position on the drug problem, but merely noting that these are among the arguments voiced to support severe criminal punishments for drug offenses. *Cf.* Husak & Callender, *supra* note 147, at 61-62 (misconstruing arguments that could be made on this issue for positions held by the author).

176. As stated above, I am not personally advocating that either knowledge or recklessness is the proper mens rea for drug crimes, nor taking a position on the underlying social issues. *See supra* note 175.

177. *Cf.* Susan Estrich, *Rape*, 95 Yale L.J. 1087, 1102 (1986) (proposing punishment for negligent rapists, but, as in murder, less severe than for those who commit the prohibited act purposefully or knowingly).

A better case for retaining the requirement of knowledge probably could be made in the areas of fraud,[178] perjury,[179] and receipt of stolen property. Fraud-related crimes might include certain property crimes (theft by false pretenses, drawing a "bad check"), as well as the crime of making false statements to public officials or to obtain public benefits.[180] In the case of fraud, individuals may be criminally punished in various circumstances for knowingly making false representations. We might surmise why it is that these crimes require knowledge rather than recklessness regarding the falsity of the representation.[181] Take, for example, "bad check" statutes, which punish, among other things, drawing a check knowing that one does not have funds to cover it.[182] Effectively, the check giver is falsely representing that he has enough money in his account to make good on the check when in fact he knows he does not. Why did the legislatures that adopted these statutes decide not to inculpate those who wrote bad checks recklessly, that is, aware of the substantial and unjustifiable risk that they did not have sufficient funds?

The idea must have been that, however morally inappropriate it is to be consciously careless about drawing a bad check, it is not culpable enough to warrant criminal rather than civil sanction. The bad check crime derived from the crime of false pretenses[183] and adopted essentially the same mens rea of knowingly making a false representation, in this case, knowingly making the implied, false representation that there are or will be sufficient funds in the account indicated on the check to honor it. Despite this evolution, however, it

178. Fraud is defined as: "A knowing misrepresentation of the truth . . . to induce another to act to his or her detriment." Black's Law Dictionary 670 (7th ed. 1999).

179. Perjury is defined as: "[A] person's deliberately making material false or misleading statements while under oath." *Id.* at 1160; *see, e.g.*, 18 U.S.C. § 1621 (2000) (federal perjury statute).

180. *See, e.g.*, 18 U.S.C. § 1001 (2000) (federal false statement statute).

181. Making a representation that something is the case when one knows one does not know whether it is the case may also qualify as knowingly making a false representation. *See* LaFave, *supra* note 14, § 8.7(f), at 840 & nn.80-82. It is possible to view this as an instance of recklessly making a false statement, that is, representing as fact something that you are aware there is a substantial and unjustifiable risk is not fact. Or, one could view this as knowingly making a false statement, that is, representing as fact something that you are aware you do not know to be a fact. It is unclear whether the criminal law consistently treats the above-described instance as a knowing or reckless misrepresentation, but most sources continue to describe the mens rea for false representation crimes as knowledge of falsity and not recklessness as to truth.

182. LaFave, *supra* note 14, § 8.9(b), at 853 (indicating that most bad check statutes require only knowledge of the insufficient funds); *see, e.g.*, Annotation, *Construction, Application, and Effect of Criminal Statutes Directed Specifically Against Use of Worthless, False, or Bogus Check or Draft*, 35 A.L.R. 375, 376-78 (1925).

183. There were several difficulties in relying on the crime of false pretenses to combat the problem of worthless checks, which led to the development and adoption of bad checks statutes. LaFave, *supra* note 14, § 8.9(a), at 851-52; Model Penal Code § 224.5 cmt.1 (1980).

is not enough to say knowledge was required for this crime because it was required for the antecedent crime of false pretenses. The mens rea for the two offenses is not identical, as an intent to defraud is also necessary for the false pretense offense but not under many bad check statutes.[184] Moreover, it would still remain to determine either why knowledge was a part of the requirements for the antecedent crime or, more importantly, why this element of the antecedent mens rea was retained for this new, and otherwise different, offense.[185]

One could posit at least two reasons for the legislative conclusion that drawing a bad check must be accompanied at least by knowledge that the check is "bad" in order to qualify as a crime. First, writing a bad check involves injury to another's property interest—the payee will be out a certain amount of money.[186] While this may be an interest legitimately to be protected by criminal sanction, it is not usually considered as important an interest as physical well-being.[187] Therefore, it would be natural for crimes of financial injury to be harder to establish—and hence the harm less often criminally punished—than crimes of physical injury. It would be understandable for legislatures adopting bad check statutes to have viewed the property interest involved as rising to a level warranting criminal protection only when the injury is done by someone who is at least aware that he actually is cheating the payee, not just aware that there is a (substantial and unjustifiable) risk that he might be. Second, we can easily envision actors who are not especially evil being reckless about writing a bad check. I'm busy; I don't know how much money is in my account, though I'm aware that it might not be enough to cover this check; however, some bill is long overdue; and so I write the check. I've committed a consciously careless act. It's not admirable

184. *See* Model Penal Code § 224.5 cmt. 2 (1980) (explaining that the model statute "aligns itself with those pre-existing bad-check laws that defined the criminal state of mind as knowledge that the check will not be paid rather than as an intent to defraud," and that this "lower culpability level is a common feature of recently drafted bad check laws" (footnotes omitted)).

185. Theft by false pretenses and bad checks are not treated exactly the same in criminal law. As noted above, they do not always contain the same mens rea. *See supra* note 184. In addition, the punishment for the latter is usually less severe. *See* LaFave, *supra* note 14, § 8.9, at 851. Here again, as with the federal drug laws, significant research has not revealed any legislative or even judicial explanation for the selection of knowledge rather than recklessness as the mens rea for bad check statutes.

186. These statutes were intended to criminalize drawing bad checks in order to protect the commercial and banking systems and public confidence in them. *See, e.g.*, State v. Avery, 207 P. 838, 839 (Kan. 1922) (stating that the purpose of the worthless check act was "generally to avert . . . mischief to trade, commerce, and banking"); LaFave, *supra* note 14, § 8.9(b), at 852-53.

187. One indirect indication of this is that bad check offenses are usually only misdemeanors, unless a certain sum or repeat offender was involved, and in some jurisdictions are limited to misdemeanor status. *See* LaFave, *supra* note 14, § 8.9(b), at 853.

for sure, and the drawee should have redress against me, but should I be considered a criminal? Have I yet crossed the line from private to public nuisance? On the other hand, suppose the same scenario, except that I actually know I do not have enough money to cover the check and decide to send it anyway. Now I'm not just consciously careless. I know that I'm invading someone else's property interest, yet I go right ahead. In this case, it is harder to imagine ourselves as that person. It would be understandable if legislatures found the latter act and actor significantly more repugnant, sufficiently more to warrant criminal sanction. At the point at which I am actually aware that I am mucking up the system and don't care enough to restrain myself, perhaps I have crossed the line from private to public wrongdoer.

If these factors help to explain why knowledge is the required mens rea for bad check offenses, they might also seem to account for any reluctance to lower the mens rea, as was done for rape or arguably might be done for drug crimes. The property injury involved is usually considered less important than the physical and psychological integrity injuries involved in rape. As discussed above, this was one significant point made in the attack on the old rape laws.[188] The property injury is also arguably distinct from the harms at issue in drug cases, which could be viewed as potential physical injury to ultimate drug users and the enormous social tolls of drug use.[189] Financial injuries of the sort encountered in connection with bad checks often seem properly redressed as commercial matters, under civil law. While physical integrity is so vital that we might want to shift the onus of a mistake about consent to engage in intercourse onto those who make it, there does not seem to be any comparable argument to be made for shifting the onus of mistake about how much money was in one's bank account. As with rape and drug importation, we probably could readily ascertain the matter in question (whether we had sufficient funds), but, in the latter instance, we do not appear to be quite as evil if we fail to do so. In short, people who are consciously careless about others' financial interests simply do not seem as reprehensible as those who are consciously careless about others' physical and psychological well-being. Also, in contrast to rape or drug offenses, one would be hard pressed to point to the social scourge of bad checks, however plentiful they may be.[190] Mistakes about sufficient funds do not usually lead to such ills as lives wasting away in narcotic stupors, the violence associated with drug

188. *See* discussion *supra* notes 164, 166 and accompanying text.

189. *See* discussion *supra* note 175 and accompanying text.

190. *See* LaFave, *supra* note 14, § 8.9(c), at 854 (providing, as an example of the widespread incidence of bad checks, the fact "that one-half of one per cent [sic] of all checks written in Nebraska were bad checks," the vast majority involving insufficient funds).

crime, or the physical and psychological violence inflicted during unwanted sex that is claimed to be widespread in cases of "date rape."[191]

Similar arguments could be made for other fraud and false statement crimes, and for receipt of stolen property, all of which involve property as opposed to bodily harm. At the end of the day, even if there are some crimes currently requiring knowledge that could reasonably be altered to require a lesser mens rea, there will inevitably be others for which knowledge remains an apparently preferable standard. The problem that arose in *Sansregret* cannot be obviated across the spectrum of criminal law simply by eliminating the requirement of knowledge.

Moreover, it is not entirely certain that lowering the culpable mental state for rape from knowledge to recklessness would have resulted in Sansregret's conviction. As discussed earlier, it certainly would have been easier to find the defendant guilty if the fact-finder had only to conclude that Sansregret was aware of the risk that his victim's consent was coerced, rather than to find that he knew her consent was coerced.[192] However, both these mens rea require findings of subjective states of mind. In the case of knowledge, awareness of the fact is required and in the case of recklessness, awareness of the risk of the fact is required. Crediting his ex-girlfriend's testimony about his level of self-delusion, it might still be difficult for a fact-finder to conclude beyond a reasonable doubt that Sansregret was aware even of the risk of coerced consent at the time of intercourse. Eliminating the knowledge requirement not only is not a universally transferable idea, it might not even have assured the desired result in *Sansregret.*

B. *New and Improved Willful Blindness*

Another proposed solution to the *Sansregret* problem was to redefine one of the traditional mental states so that it fit the facts involved. Mark McElman, writing specifically about the *Sansregret* case, did just that. He suggested "a new conception of wilful blindness" that would include what was apparently going on in Sansregret's mind at the time he had intercourse with his ex-girlfriend.[193] McElman did this by drawing a distinction between what he calls a "deliberate" suppression of risk awareness, which is the construct encompassed by traditional definitions of willful blindness,

191. *See, e.g.*, Dressler, *supra* note 12, § 33.02, at 571-72 (detailing statistics on the incidence of rape); Estrich, *supra* note 12, at 10-15 (discussing the incidence of forced sex, particularly among acquaintances).

192. *See supra* notes 82-85 and accompanying text.

193. *See* McElman, *supra* note 128, at 343.

and what he terms an "active" suppression of awareness, which is his suggested alternative formulation.[194]

This section explores McElman's thesis in some detail, and then rejects it as an acceptable corrective for the conundrum of incriminating the type of bad acts under examination. His proposed reformulation of willful blindness suffers from problems in its conceptualization. In addition, it would not even inculpate Sansregret. But more importantly, it does not translate well beyond the specific context in which he crafted it, and, if adopted, could result in exonerating more wrongdoers across the spectrum of crimes than it indicts.

When McElman uses the term "deliberate suppression" he means to refer to that aspect of traditional willful blindness that involves deliberately turning away from positive knowledge, or declining to make inquiry, in order to avoid learning or knowing the truth after one becomes aware of the need for inquiry.[195] He is dissatisfied with this definition of willful ignorance, as were others who had commented earlier on the subject, because it does not adequately distinguish willful blindness—and therefore knowledge—from recklessness.[196]

To remedy this problem, he proposes using instead "active suppression" as the proper conception of willful blindness. Since he does not quite define active suppression, this takes some explication. McElman begins by establishing that, in traditional epistemological terms, knowledge is a tripartite construct, requiring "[1] justified, [2] true [3] belief."[197] This epistemological definition contains both objective and subjective elements: 1) the belief is subjective; 2) the truth of what is believed is objective; and 3) the condition of justification is a hybrid objective-subjective concept that links the (subjective) belief to the (objective) fact.[198] Justification is subjective in that it must actually be held in the mind of the believer, but also objective in that it must "be objectively capable of supporting the inference that the fact believed is probable."[199]

McElman distinguishes the legal element of knowledge from this epistemological model by arguing that legal knowledge is only a

194. *Id.* at 331.

195. *Id.* at 330.

196. *Id.* at 331 ("This doctrine has an uneasy feel . . . . On this account, it seems that wilful blindness may simply be a convoluted form of recklessness."). *Accord* Robbins, *supra* note 148, at 195-96, 232-34; *see also* Charlow, *supra* note 66, at 1382-90 (explaining that willful ignorance takes many forms, some of which are more like recklessness than knowledge).

197. McElman, *supra* note 128, at 332. "Thus, one has knowledge in respect of some fact if, and only if one believes the fact to be true, one is justified in believing it to be true, and the fact is, indeed, true." *Id.* at 332-33.

198. *Id.* at 333.

199. *Id.*

bipartite construct, one that eliminates the justification element. Thus, legal knowledge requires only: 1) that "the prescribed condition actually existed at the time of the alleged offence" (an objective element—part of the actus reus of the crime), and 2) that "the . . . accused believed the condition to exist" (a subjective element—the mens rea of knowledge).[200] This formulation, McElman believes, is too simplistic and results in "error[s]" in which punishment is imposed "in absurd ways," that is, on those who are no more than foolish in believing something to be the case when such a belief is not at all justified (even though it may, quite coincidentally, turn out to be true in a given instance).[201] McElman uses the example of a man who buys a saxophone from a pawnshop mistakenly believing the owner of the shop to be a crook.[202] When the man, consumed by guilt, turns himself in to the police, it is discovered that the otherwise exceptionally reputable pawnshop owner had on this unusual occasion purchased a stolen saxophone.[203] McElman argues that it would be error to punish the man, though he correctly believed he was purchasing stolen goods, because his belief was not justified, and this unjustified but true belief is a form of mistake.[204]

To avoid such errors, McElman maintains that the criminal law must interpose the exculpatory doctrine of mistake.[205] However, according to McElman, under present law a mistake will exculpate on the sole condition that the mistaken belief is honestly, or actually, held, which can lead to absurd results.[206] For example, absurd results occur because the mistake doctrine does not distinguish, as do

200. *Id.* There is disagreement in the literature about whether legal knowledge actually differs from epistemological knowledge in this regard. One article maintains that justification is an essential element of legal as well as philosophical understandings of knowledge. *See* Husak & Callender, *supra* note 147, at 47-48. Apparently, the authors reach this conclusion by reasoning that one must be responsible in order for criminal liability to attach, and that one cannot be responsible for simply having a true belief because people "have little voluntary control over what they believe" and no control over what is true. *Id.* at 47 n.72. Professor Pillsbury, as explained in the following section, would appear to disagree with the underlying premise of this argument, that people have little voluntary control over what they believe and therefore are not responsible for it. *See* discussion *infra* Part II.C.1.

201. McElman, *supra* note 128, at 333-34.

202. *Id.*

203. *Id.* at 334.

204. *Id.* Though McElman calls this a "mistake," it is not like the mistake of fact that normally excuses in criminal law, as the man does not hold a subjective belief about the fact in question (presumably, the stolen nature of the goods) that is contrary to objective reality. Indeed, it is somewhat confusing to call the man's correct belief that the saxophone was stolen a mistake. Perhaps McElman does so, in part, because the man has made a factual mistake about the honesty of the pawnshop owner, but that fact is not likely to be an element of an applicable criminal offense, as the fact of the stolen nature of the goods obtained might be.

205. *Id.* As McElman impliedly acknowledges, the mistake in his previous example does not meet the standard for exculpatory mistakes in criminal law. *Id.* at 334-35.

206. *Id.* at 334-45.

epistemologists, between honestly held "recalcitrant" beliefs and other honestly held beliefs. Recalcitrant beliefs are "unresponsive to change, due to a high degree of internal coherence," even when that internal coherence is not only objectively unjustified but actually ridiculous.[207] When people hold such recalcitrant beliefs, "perceptual indications inconsistent with the cohered system are discarded as unworthy of consideration or belief."[208] In other words, people with honest but recalcitrant beliefs *actively* suppress the truth.[209] According to McElman, such people do not *deliberately* suppress knowledge, in the deliberate sense of willful blindness, but they do *actively* suppress knowledge, in the epistemological sense just described.

McElman then explains why he thinks active suppressers are criminally culpable people. First, active suppressers are not responsive to their environment because they hold beliefs that cohere into a system and are not isolated mistakes. Their recalcitrant beliefs "distort [their] perception of reality and actively suppress[] the formation of true belief," such that, unlike reasonable people whose "beliefs reflect reality," for them reality becomes a reflection of their beliefs.[210] Thus, they are distinguishable from people who make "simple" mistakes, of the sort we might be inclined to excuse.[211] Second, an active suppresser's recalcitrant web of belief can be inconsistent with criminal laws that accept premises contrary to those of the recalcitrant belief.[212] In these instances, the beliefs "deny . . . fundamental assumptions of the criminal law" and can "become a law unto [themselves]."[213] Third, active suppressers' beliefs can cause them to act in ways that put others at risk of harm, whether or not they realize it, and are sometimes "likely to subject people to the type of harm contemplated by the law."[214] All these add up to reason to punish criminally recalcitrant believers—active suppressers—whose beliefs cause them to reject knowledge of some important fact when knowledge would normally be required for conviction.

McElman sets out to explain why active suppression of true belief is a better conception of willful blindness than the traditional deliberate suppression model. In the end, however, he only establishes why he thinks deliberate suppression is problematic, then jumps from there to

207. *Id.* at 336.
208. *Id.*
209. *Id.* at 337.
210. *Id.*
211. *Id.*
212. McElman uses the example of someone who subscribes to an avant garde scientific theory that cocaine does not exist. This belief, no matter how sincerely held, is inconsistent with the premise of the criminal law that cocaine does exist. *Id.* at 335-37.
213. *Id.* at 337.
214. *Id.*

the assumption that active suppression must be not only a proper construct for willful blindness but the better one as well. According to McElman, deliberate suppression fails for two reasons. First, it is indistinguishable from recklessness. Deliberate aversion of positive knowledge of a fact only occurs after one is aware of a risk that the fact exists. "Once the mind has averted to a risk, recklessness attaches to any actions until concerns about the risk have passed."[215] But concerns—and therefore recklessness—can only pass by giving the risk further consideration, not by deliberately ignoring it. Thus, deliberate suppression necessarily presupposes and is coexistent with recklessness, not knowledge. Second, "the process of belief formation is automatic and not subject to influences of the will."[216] As soon as an individual evaluates some justification for believing risk is present, the individual acquires a belief regarding the risk, and that belief remains until it ceases to be justified, whether or not the individual has the belief at the forefront of his mind or even tries to ignore it.[217] McElman implies that this means deliberate suppression is an epistemologically unsound notion. He then concludes that, given these two problems with deliberate suppression, the doctrine of willful blindness would better focus on active rather than deliberate suppression. The active suppression model "is distinct from recklessness and not founded on shaky epistemological grounds."[218]

It is not difficult to see how McElman brings this back around to *Sansregret*. He maintains, in essence, that if the defendant's belief that his ex-girlfriend wanted to have intercourse with him actively suppressed a correct interpretation of the evidence that he did not really have her consent, then he should be considered willfully blind and barred from asserting that his honest but mistaken belief negated knowledge of her nonconsent.[219] There are at least three reasons for this. First, his mistaken belief that she wanted intercourse was likely recalcitrant, would likely cohere into a myth about the meaning of particular communications regarding consent, and would then color his interpretation of her communication to the contrary, so that he would take "indications of 'no' as indications of 'yes.'"[220] This kind of myth, one that actively suppresses the correct interpretation of communication, cannot be allowed to exculpate because allowing this would foster the holding of such myths about women and their consent to sex.[221] Second, Sansregret's mistaken belief that his ex-girlfriend wanted intercourse denies a fundamental premise of the

215. *Id.* at 338.
216. *Id.* This view seems to be directly contradicted by Professor Pillsbury. *See* discussion *infra* Part II.C.1.
217. *Id.*
218. *Id.*
219. *Id.* at 340.
220. *Id.*
221. *Id.* at 340-41.

criminal law—to wit, that it is the complainant's attitude alone that determines whether there is consent—that has been adopted in order to protect women's sexual autonomy.[222] And finally, crediting an accused's incorrect belief that a complainant desired intercourse "is likely to place women directly at risk of the very harm contemplated by [the] sexual assault law."[223] Therefore, Sansregret's active suppression of the truth about consent is rightfully criminally culpable and his mistake resulting from this active suppression should not exculpate him.

There are several weaknesses in McElman's analysis, and we should be concerned about adopting his proposal in any event. As alluded to above, he jumps from arguments that deliberate suppression is the equivalent of recklessness, and epistemologically undesirable, to the conclusion that active suppression is a proper model for willful blindness. This is a non sequitur. Perhaps the notion of deliberate suppression fails sufficiently to emulate knowledge rather than recklessness, so that willful blindness defined as deliberate suppression should not serve as a wholesale knowledge equivalent.[224] And it also may be that the concept of deliberate suppression is not epistemologically accurate or defensible. But the proper conclusion to draw from these proofs is not that deliberate suppression does not capture the essence of willful blindness, and certainly not that active suppression does. Rather, it is simply that willful blindness, understood, as it historically has been, as deliberate suppression, is not a sound concept in and of itself (epistemologically), and also not a proper knowledge equivalent.[225]

Moreover, there is something unsatisfactory about McElman's arguments regarding his active suppression construct and its relationship to willful blindness, criminal culpability, and even Sansregret. It seems at least mildly problematic in the application of criminal laws to have to distinguish recalcitrant beliefs, especially those that cohere into a "myth," from "simple" mistakes, that presumably do not have these characteristics. If these are issues of fact, then the determinations of recalcitrance, myth, and other similar matters would devolve to the jury. One only has to imagine a set of jury instructions explaining the distinction between recalcitrant myths and other mistakes, let alone defining active suppression, to see the difficulty. Moreover, McElman's arguments for the culpability that inheres in recalcitrant beliefs and active suppression seem to boil down to the premise that there are good reasons to punish someone

222. *Id.* at 341.
223. *Id.*
224. For the argument that forms of willful blindness resembling recklessness rather than knowledge should not be used as knowledge equivalents, see Charlow, *supra* note 66; Robbins, *supra* note 148.
225. *See supra* note 224 and accompanying text.

like Sansregret criminally, even though he did not have the required knowledge of nonconsent and did not fit the traditional model of willful blindness. His arguments in favor of criminal liability are quite convincing. But they do not even explain why, let alone prove that, active suppression is or should be willful blindness. Rather, McElman has provided good reasons to change the mens rea regarding consent in rape law, or perhaps even to change our traditional limited catalogue of mens reas generally; he has not provided good reasons to alter our conception of willful blindness in the way he proposes.[226]

Considering his suggestion on its merits, it does not seem a good idea to change the definition of willful ignorance to the active suppression model. First, the criminal doctrine of willful blindness has been around for at least 100 years.[227] As I have argued at some length elsewhere, deliberate suppression, or something very like it, is an essential part of what evolved into willful blindness, and remains an essential part, though not the whole, of what makes willfully ignorant behavior culpable at anything close to the level of knowing behavior.[228] There is no apparent justification for contorting a long established mental state into something entirely different—possibly even creating a misnomer in the process[229]— to encompass liability for someone who simply does not exhibit that mental state. It seems more sensible instead to propose liability for the offending party on the basis of the actual, perhaps previously unrecognized, culpable mental state that he does exhibit.

Second, changing the meaning of willful ignorance could backfire as an effort (and this is McElman's avowed effort) to encompass more bad behavior within rape law. Active suppressers might then be guilty of rape even if the mens rea regarding nonconsent in rape remained knowledge, but deliberate suppressers, who could be guilty under the previous definition, might not be. This outcome might not bother McElman, because he thinks deliberate suppression is only recklessness and therefore not appropriately inculpatory for a knowledge-level crime like rape anyway. But a close reading of his interest in the matter suggests that McElman would inculpate people like Sansregret, not exonerate reckless rapists.[230] In fact, some of the

226. It is possible that simply reducing the mens rea regarding consent in rape law to recklessness still might not ensure Sansregret's conviction. *See supra* note 193 and accompanying text. If this is so, it might be advisable to make further changes in the mens rea of rape, or in the list of available culpable mental states. But these points do not implicate willful ignorance.

227. *See* Charlow, *supra* note 66, at 1353 n.7, 1361-62 (discussing older willful blindness cases).

228. *See id.* at 1401, 1415-16.

229. *Willful* blindness, by its very terms, connotes *deliberately* engineered aversion of knowledge, though not necessarily *actively* suppressed knowledge. "Willful" is defined as deliberate, not as "active," and "active" is defined in an entirely unrelated way. *See* Webster's New World Dictionary 13, 1528 (3d college ed. 1991).

230. McElman provides a singularly unlikely hypothetical to distinguish a

reasons he gives for wanting to find Sansregret guilty, such as protecting women's autonomy regarding sex and avoiding incentives to harbor myths that place women at risk of the very harm contemplated by the rape law, could just as readily counsel against exonerating deliberate suppressers, and even reckless rapists, as active suppressers.

Third, and perhaps most important, changing the meaning of willful ignorance would have far reaching effects, potentially altering liability for all crimes for which knowledge is required and willful blindness may suffice. The fallout would not be limited to rape. Even if he had made a good case for the propriety of using this device to inculpate all active suppressers like Sansregret and exculpate all deliberate suppressers for the particular crime of rape, he has made no case—and I cannot imagine one—for doing this with regard to any and every crime containing a knowledge requirement.

Finally, McElman's attempt to cabin Sansregret within his construct of active suppression is faulty. While he may be correct that Sansregret held a recalcitrant belief in his victim's desire to have intercourse with him, and that this belief may have cohered into a myth about the meaning of particular communications regarding consent, so that he would be inclined incorrectly to understand communications of "no" as communications of "yes," this scenario simply does not fit the facts of the *Sansregret* episode described by the complainant and found by the trial judge. As the victim testified, she did not communicate "no." Rather, she did her very best to communicate "yes."[231] The problem was not the defendant's misunderstanding about what the victim communicated regarding consent, it was his misunderstanding about the effect of his coercive behavior on the victim. In other words, as explained previously, this was not really a nonconsent rape case so much as a coerced consent rape case, in which the victim probably did consent, though only because she was coerced into doing so.[232]

It might seem that there is nothing valuable left to McElman's theory. This is not my conclusion. One must give McElman substantial credit for attempting to describe the complex nature of Sansregret's reasoning and mistake, and for distinguishing it from traditional willful blindness. Equally important, he has unpacked some of the reasons for the sense of offense that one intuits regarding

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supposedly reckless rapist from an active suppresser rapist, but it is not even clear that the potential accused in that case was subjectively aware of the risk of nonconsent, and so may not have been even reckless. *See* McElman, *supra* note 128, at 342. This would mean the defendant—however unlikely he is to exist in the first place—possibly should not be guilty of rape, but not because he was only reckless rather than knowing about nonconsent.

231. *See supra* notes 78-80 and accompanying text.

232. *See* discussion *supra* Part I.B.

Sansregret's active suppression. These are important points, as they illuminate the larger issue of bad acts that seem to implicate the very purposes of crimes the elements of which are nevertheless not met. His perceptions about the nature of the offensiveness of Sansregret's mental state are reflected and further developed in the psychologically-based analysis of Professor Pillsbury, which follows. In the next section, this article continues McElman's efforts by exploring the possibility of imposing criminal liability on all of his active suppressers, including Sansregret, in some other, hopefully less distorting, way.

C. *A New Mens Rea?*

One promising prospect to resolve the issue of noncriminal bad acts is to formulate an entirely new mens rea that identifies what is going on in the minds of the individuals whose mental states do not conform to traditional knowledge or willful blindness requirements. In recent years, several writers have named various forms of "indifference," that appear to encompass the relevant state of mind, as sufficiently culpable mental states to warrant criminal sanction. These notions seem tailor-made for the problem under examination; surely Sansregret and McElman's other "active suppressers" exhibited callous indifference toward their victims. In the following sections, I explore a particular model of indifference analysis, one based on relatively recent developments in research in the area of cognitive psychology. This formulation of indifference as a reprehensible construct is appealing both on its own terms, and as applied to inculpate noncriminal bad acts. But it presents practical and conceptual obstacles in implementation, particularly in asking jurors to make ad hoc, personal, moral determinations. While it is, perhaps, the most promising of the suggestions considered, ultimately, like the previous remedies, it could create more problems than it would resolve. Indifference analysis might more successfully serve to inform sentencing, but, as also discussed, that would not rectify the problem of inculpation.

1. Indifference as a Guilt Determinant

In an article urging that murder and manslaughter liability attach to certain negligent homicides, Samuel Pillsbury develops a notion of what he terms "indifference" (or sometimes "callous indifference" or "moral indifference") that might be useful here as well. Others have written about indifference as a possible alternative criminal mens rea, but Pillsbury's development of the notion, based on research in psychology, seems to have the most relevance in the present context

of knowledge-level crimes.[233] Pillsbury's basic idea is that actual awareness of the fatal risks involved should not be required for conviction for unintended killings. He would substitute "indifference to the value of others" for awareness of the risk of death as the proper measure of criminality.[234] His delineation of indifference as an alternative mens rea and his arguments for preferring it over awareness of risk have resonance with the problem at hand and merit further explication.

Pillsbury explains that the metaphor of introspection motivates our reliance on awareness of risk as a culpable mental state. We generally assume that the human mind follows a linear pattern of perception, information sorting/evaluation, and decision-making.[235] In this view, perception (the first step) is not chosen, and awareness (internal notice of that perceived—the second step) is a "prerequisite for choice" (the third step).[236] Thus, moral responsibility and criminal culpability only occur at the third stage of the mental progression, when a decision is made to act despite the earlier, unchosen perception of risk.[237]

In contrast, cognitive scientists assert that the brain does not operate according to this linear, introspective view of human intelligence.[238] Rather, they see brain function as a "continuous interaction of rival perceptive and analytic processes."[239] In this model, perception may involve choice. We are bombarded with sensory data, and can only attend to some of it, so we make choices about what to perceive (see, hear, etc.) and what to ignore.[240] Eventually, we formulate pre-established agendas about what to perceive or ignore, so that, even though perception usually seems

233. In a recent article, Kimberly Ferzan explores Pillsbury's indifference construct as well as earlier versions of indifference liability proposed by R. A. Duff and Kenneth Simons. Kimberly K. Ferzan, *Opaque Recklessness*, 91 J. Crim. L. & Criminology 597, 611-27 (2001) (citing and evaluating R. A. Duff, Intention, Agency, and Criminal Liability: Philosophy of Action and the Criminal Law (1990), and Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence,* 1994 J. Contemp. Legal Issues 365). All four of these treatments of forms of indifference (Duff's "practical indifference," Ferzan's "opaque recklessness," Pillsbury's "callous indifference," and Simons' "culpable indifference") engage the issue of criminal liability for less than traditional reckless conduct, that is, for various forms of what is now relegated to noncriminal negligence. I have singled out Pillsbury's ideas to explore in this article because they are substantially grounded in a view of the human mind that stems from psychological research that, in particular, appears to have implications not only for negligence but also for the somewhat different issue of knowledge.

234. Pillsbury, *supra* note 84, at 106.

235. *Id.* at 138.

236. *Id.* at 141.

237. *Id.* at 129-37.

238. *Id.* at 138.

239. *Id.*

240. *Id.* at 144.

automatic, it is sometimes actually chosen.[241] Attention—whether we notice a particular fact about the world—similarly may occur as the result of an automatic process that, at some point in the past, was the result of a decision about perception priorities.[242] As a result, perception priorities and attention are subject to self-conscious direction, self-consciousness is essential "to choice, [and] choice may cover . . . both awareness and unawareness."[243] Therefore, both awareness and unawareness may be proper subjects for criminal responsibility, and "perception should be considered a part of responsible choice rather than a prerequisite to it."[244]

Pillsbury concludes that "[c]riminal responsibility should depend on the nature of the risks involved, their obviousness, and the reasons for the defendant's lack of perception or disregard of those risks."[245] He reasons that "[w]e judge persons according to their choices, on the assumption that they are responsible for the motivations which drive those choices. . . . Motivations to perceive, or not perceive, therefore, should be considered part of the individual's base responsibility," even when those motivations are neither consciously nor freely chosen and instead stem from genetic "hard wiring" or the unchosen environments in which we are raised.[246] Thus, "[w]e may blame persons for failing to perceive risks to others when we can trace their lack of awareness to bad perception priorities," such as assigning too low a priority to the value of human life.[247] When people act in ways that display such "serious disregard for the moral worth" of others, Pillsbury concludes that we may—indeed should—punish them criminally.[248]

He specifically explores the concept of indifference as a form of mens rea in the law of rape. He notes that American courts essentially require participants in sexual intercourse to make a significant effort to determine their partners' desires, because an unreasonable mistake about consent is not sufficient to constitute an excuse for nonconsensual intercourse, and sometimes even a reasonable mistake will not exonerate. This illustrates that awareness of nonconsent is considered too narrow a standard for rape in the United States.[249] Pillsbury concludes, "A person may display serious

241. *Id.* at 144-45.
242. *Id.* at 148.
243. *Id.* at 149.
244. *Id.* at 106.
245. *Id.*
246. *Id.* at 150-51.
247. *Id.* at 151.
248. *Id.* at 152.
249. *Id.* at 173. With only a few exceptions, this appears to be the case. *See supra* note 63 and accompanying text.

indifference to another—enough to deserve criminal punishment—and yet lack actual awareness of nonconsent."[250]

Pillsbury's indifference idea appears tailor-made for the facts of the *Sansregret* case. Certainly the defendant displayed a serious enough indifference to the moral worth of his victim as to deserve criminal punishment, even if he lacked actual awareness of the coerced nature of her consent. It is possible that his unawareness stemmed from some personal motivation that affected his attention to the otherwise obvious facts. If so, Pillsbury suggests we should inquire *why* the defendant was unaware. In his reasoning, we are criminally responsible for the motivations that affect our choices of what to perceive or attend to, even when those motivations are part of our unchosen personality. Since, as a result of his (possibly unchosen) motivations, Sansregret may have chosen not to attend to the facts that rendered his victim's consent coerced, and since that choice reflected a serious disregard for the moral worth of another, he displayed the kind of indifference for which he ought to be criminally responsible.

On the other hand, it is possible that Sansregret's unawareness of coerced consent did not stem from his failure to attend to (that is, take conscious note of) the relevant facts. Perhaps, instead, he was fully aware of all the facts but exercised inappropriate judgment about their significance, and thus reached the flawed conclusion that consent was not coerced. To put it another way, perhaps he was unaware of the ultimate fact of coerced consent, though aware of the contributing facts that indicated the ultimate fact. If this was the problem, then it would not really seem to be his perception or attention that was at fault, but rather his reasoning, that is, his mental manipulation of the facts which he perceived and to which he was attending. In short, perhaps Sansregret's situation does not really fall within Pillsbury's indifference construct, as the construct relates to failures of perception or attention and not to faulty reason. Or, perhaps, Pillsbury is still on point, because Sansregret still did not attend to the ultimate fact of coerced consent.

In the end, this distinction should not make very much difference for Sansregret's responsibility or even for Pillsbury's larger point about indifference. Reasoning, even more clearly than perception or attention, reflects choice. Extrapolating from Pillsbury, even if Sansregret's faulty reasoning stemmed from unchosen personal motivations, we should hold him criminally responsible for the choices he made, in this case, choices to credit certain (perceived and attended to) facts more than others. Thus, if he was unaware of the ultimate fact of coerced consent, he should nevertheless be responsible if that unawareness was the result of choices about which perceived facts to

250. Pillsbury, *supra* note 84, at 174.

credit, and those choices reflected a serious disregard for the moral worth of his victim. If, on the other hand, his choices about how to weigh the perceived and attended to facts did not reflect a serious disregard for the moral worth of his victim's bodily integrity, then presumably he should not be guilty because of his lack of knowledge of coerced consent.

It seems that much, maybe most, maybe almost all negligent behavior could become criminal under Pillsbury's construct.[251] Only inattention or unawareness that stemmed from a morally acceptable choice not to attend, or about how to weigh the evidence, would escape liability. In rape, particularly coerced consent rape, what would that be? Not realizing that you had coerced another into consenting to intercourse despite a risk that others would have perceived (negligence) would seem virtually always to stem from indifference to the other person's physical or psychological independence and integrity. In most of the Western world today, that is not a morally acceptable motivation. As for nonconsensual rape, there again do not appear to be many (or perhaps any) instances in which the motivation for not attending to those factors, obvious to others, that indicate nonconsent would be anything other than indifference to the value or integrity of another.

Pillsbury provides as an example of a criminally innocent lack of attention a father who runs a red light, fatally injuring another, in order to rush his severely injured child to the hospital.[252] He contrasts this to a teenager who runs the red light while showing off to friends.[253] The teenager's negligent conduct demonstrates indifference to the moral worth of others, while the father's demonstrates a tragic conflict between valuing his child and valuing others.[254] It is difficult to translate this homicide example to rape, as it is difficult to imagine a case in which one must choose between having intercourse with someone who might not be consenting and some other moral imperative. Someone might misattend to nonconsent to intercourse because he is preoccupied dealing with a personal tragedy, but that is not the same morally acceptable motivation as that of the hypothetical father who needed to do the criminal act (run the red light) in order to secure some other, competing moral good. If there are virtually no instances of non-indifferent negligent rape, the argument for indifference as the appropriate standard for nonconsent or coerced consent in rape then seems to boil down to an argument that negligence is the proper mens rea for rape overall. As discussed

251. Although Pillsbury does not argue for universal application of his theory, and confines his conclusions to the limited case of inadvertent homicide, he recognizes the larger significance of the issues he raises. *Id.* at 107, 111-12.

252. *Id.* at 151-52.

253. *Id.*

254. *Id.* at 152.

immediately above and in Part II.A, negligence, or at least something less than knowledge, may well be an appropriate culpable mental state for rape.[255]

The question remains, however, whether rape is just a special case because knowledge was never a good mens rea, or whether there is something to the indifference idea that could make a meaningful difference with regard to other knowledge-level crimes. Would indifference work as a proper mens rea for the remaining knowledge-level crimes? The answer should depend on how many and which reckless and negligent acts related to what are now knowledge-level crimes we might want to punish criminally. As suggested above, we do not want simply to alter the mens rea of every crime requiring knowledge.[256] Sometimes there are reasons to prefer knowledge over the current alternatives. Would separating out and also punishing the more callously indifferent instances of reckless and negligent behaviors make sense?

At the threshold, the ambiguous nature of the indifference inquiry raises issues. First, logistically, juries, the usual criminal fact-finders, presumably would be asked to make determinations of motivation. Did Mr. *X* take Mr. *Y*'s umbrella negligently (unaware that it was someone else's property when he should have been aware) because he was indifferent to the moral worth of someone else's interests, or because of the heartrending conflict of needing the umbrella to shield his sick child from the rain? If he needed to shield his healthy but young child, would that qualify as a sufficiently morally acceptable reason to fail to attend to the property interests of others? One problem with employing indifference as a general standard for culpability is that most negligent actors are indifferent to the interests of others. This would mean that in every case of at least negligent conduct, which is almost every case, jurors would be asked to explore the reasons for the defendant's indifference, as well as the presumably relevant level of indifference and the kind of interest to which he was indifferent, before deciding whether criminal liability should attach. It seems problematic to ask jurors in every case of negligent conduct not only to make determinations of motivation, but to make a moral assessment about them as well.

Second, the ambiguity just illustrated could render the criminal law too indeterminate altogether. A basic precept of criminal law is that it must give potential offenders notice of which behaviors will be considered legal transgressions. The indifference approach adds another layer of murkiness to existing mens rea standards by introducing a very explicit moral judgment about subjective

255. Professor Schulhofer argues that reckless and negligent rape look the same in practice, and that recklessness is a perfectly proper criminal mens rea in general and for rape in particular. Schulhofer, AALS Address, *supra* note 66.

256. *See* discussion *supra* Part II.A.

motivation into the determination of guilt or innocence.[257] Even more troublesome is the fact that the very same arguments offered for using indifference as a standard could be asserted for using any motivation-based, ergo morality-based, standard. It seems difficult to imagine how to cabin this standard, once it is introduced as a general guiding principle. Using indifference as a mens rea is different, but not all that different, from simply asking in each instance whether we think the particular person's particular behavior worthy of criminal condemnation. Such a standard would threaten to turn criminality into an ad hoc, and post hoc, determination.

The idea of using indifference also seems inevitably to come back around to the arguments previously made for retaining knowledge as the mens rea for some crimes. If it is sometimes appropriate only to punish those who knew, should it really matter whether reckless and negligent performers of the same acts were morally lax or not in being reckless or negligent? In order to employ indifference analysis more widely than Pillsbury explicitly advocates for unintended homicides, the answer would need to be that we care to ensnare in the criminal net not only those who knew, and those who were willfully ignorant, but also those who did not know because their callous indifference to some moral value, such as the moral worth of others' interests, affected their perceptions.

In some specific instances this standard has appeal. Consider the recent Enron debacle.[258] It is certainly tempting to contemplate that corporate executives or their possibly complicit accountants could be thrown in jail for raiding the company treasury using self-serving deals of questionable value to the entity, and causing the consequent worthlessness of shareholders' investments and employees' pensions. Apparently one of the factors contributing to the scandal was use of a financial device called asset securitization that, if properly executed,

257. Pillsbury recognizes this particular difficulty:

> The indifference approach does commit the law to an explicitly moral standard. Each of the proposed offense definitions asks the jury to make a normative judgment about whether the defendant displayed a culpable lack of concern for others' physical well-being. As we have seen, overtly moral standards permit a significant degree of decision maker discretion, an uncomfortable prospect in our heterogenous [sic] society. Yet what are the alternatives?

Pillsbury, *supra* note 84, at 215-16. In defense, he argues that legislatures cannot predict the range of factual situations that would meet the standard, so the issue must be left for ad hoc determination. *Id.* at 216. Also, traditional recklessness and negligence, as well as depraved heart murder statutes, utilize explicitly moral determinations. *Id.* Finally, cautionary jury instructions can be used to insure against jurors use of indifference evidence to render judgment based on the defendant's general character instead of the facts of the case. *Id.*

258. For descriptions of the scandal, see, for example, Jenny B. Davis, *The Enron Factor*, A.B.A. J., Apr. 2002, at 40; Jonathan D. Glater, *Enron's Collapse: The Vulnerable,* N.Y. Times, Jan. 17, 2002, at C10; Eric Lichtblau & David G. Savage, *The Fall of Enron,* L.A. Times, Jan. 28, 2002, at A1.

would allow assets to be transferred off a company's balance sheet. It has been suggested that Enron's auditors certified that some such deals were completed in accordance with generally accepted accounting and auditing principles when in fact they were not.[259] If these accountants knew they were certifying falsely to the use of such principles in the preparation of required financial reports, they might be said to have "willfully" violated the Securities Exchange Act of 1934, exposing themselves to criminal liability.[260] But if they did not know and were only reckless about the false certification that generally accepted accounting principles were used, they would not be guilty of a crime.[261] Let's suppose the auditors did not know, but only because their perceptive priorities filtered out suspicious information in a self-serving way, and further suppose that in failing to attend to the falsity of their assurances, they displayed callous indifference to the financial interests of the employees and other shareholders. Wouldn't it seem morally satisfying if the callously indifferent Enron auditors were guilty, as they would be under Pillsbury's indifference approach? It will usually seem morally satisfying that callously indifferent people be guilty of a crime, at least when knowing people would be.

To test this standard in a possibly less engaging context, let's return to the earlier example of someone who draws a check with insufficient funds in the bank.[262] Suppose he does not know he has insufficient funds, but he is reckless about that fact, that is, he is aware of a substantial and unjustifiable risk that he does not have enough money to cover the check. Under present law, he is not guilty of a bad check offense. However, using the indifference standard, his guilt will

259. *See* Kurt Eichenwald, *U.S. Inquiry Tracks Insiders at Enron*, N.Y. Times, Apr. 15, 2002, at A1; Richard A. Oppel, Jr., *Enron's Many Strands: Early Warnings*, N.Y. Times, Feb. 7, 2002, at A1.

260. *See* 15 U.S.C. § 78ff(a) (2001) (outlawing willful and knowing false or misleading statements that one makes or causes to be made in any document required to be filed under the Securities Exchange Act of 1934 or under any rule or regulation promulgated under the Act). An accountant or auditor's "knowing" failure to comply with generally accepted accounting principles and/or generally accepted auditing standards in connection with audits of publicly traded companies may subject these professionals to prosecution for violation of the securities laws. *See, e.g.*, United States v. Weiner, 578 F.2d 757, 777-87 (9th Cir. 1978); United States v. Natelli, 527 F.2d 311, 320 (2d Cir. 1975); United States v. Simon, 425 F.2d 796, 805-06 (2d Cir. 1969).

261. "Knowledge . . . is required under the Securities Exchange Act of 1934 when the criminal charge is premised upon a false or misleading statement of any material fact in any application, report, or document required to be filed under the Act," Ellen S. Podgor, White Collar Crime in a Nutshell § 5.02, at 81 (2d ed. 1997); *accord* United States v. Dixon, 536 F.2d 1388, 1396-97 (2d Cir. 1976); United States v. Simon, 425 F.2d at 809, although some courts have found reckless indifference sufficient to constitute the necessary "willfulness" under other criminal provisions of the securities laws, Podgor, *supra*, at 79; *accord* United States v. Boyer, 694 F.2d 58, 59-60 (3d Cir. 1982) (finding recklessness sufficient for a criminal violation of 15 U.S.C. § 77x).

262. *See supra* notes 183-92 and accompanying text.

depend on whether his unawareness that he had insufficient funds was the result of his callous indifference to the property interest of the payee, or the result of some other, morally acceptable justification. If he wrote the check, not knowing whether he had sufficient funds, in order to obtain medical services for his gravely ill child, not from indifference to the payee's interest but agonizing over it, by extrapolating from Pillsbury's example, that might qualify as a morally acceptable counterweight. If he needed only to give his girlfriend a birthday present, presumably that would not qualify. What if he needed to keep his family housed for another month? Needed to feed his child? Needed to feed his cat? Case by case moral judgments about such matters would presumably determine guilt.

It is not surprising that indifferent, especially callously indifferent, actors will often appear to warrant criminal sanction. In a way, the present taxonomy of criminal mens rea is an attempt—perhaps too crude an attempt—to identify callous indifference at the wholesale level.[263] Knowledge is both over- and under-inclusive. It will inculpate some who did not act out of callous indifference to the interests of others, and, as in the present Enron, *Sansregret*, and bad check examples, exculpate some who did. We currently stop at the wholesale level when we conclude, for knowledge-level crimes, that the actor's callousness must be evidenced by his awareness of the evil-identifying fact in question. At the retail level, if we look at every potentially criminal act in its complete factual context, many reckless and even negligent actors will seem to be sufficiently culpable for punishment, and at the other end, a few knowing and purposeful actors will not. Pillsbury's indifference standard is appealing because it expressly incorporates a factor—callous indifference—that constructs like knowledge or purposefulness only approximate.

But the virtue of indifference is also its vice. One problem with employing it as a standard is precisely that it invites decision about guilt or innocence at the retail level.[264] If indifference is to be the measure of criminality, we need not assume that even knowing actors are callously indifferent, for some of them, too, may have acted for morally justified reasons. Indeed, even those who purposefully kill someone may have acted in the face of an understandable moral dilemma.[265] Indifference would seem to become not an adjunct to current mens rea standards, but rather a substitute for them. While perhaps theoretically justified, there are great dangers of uncertainty and instability in using such a standard outright. As discussed above, the standard is premised on fact-finders making expressly subjective, ad hoc, moral judgments. Determinations of an actor's awareness of

263. *See* Charlow, *supra* note 66, at 1391-95.

264. Pillsbury takes note of this in the limited context in which he urges adoption of the concept. Pillsbury, *supra* note 84, at 215-16.

265. *See, e.g.*, Regina v. Dudley and Stephens, 14 Q.B.D. 273 (1884) (Eng.).

some fact must also be made in each case, and are aimed at fleshing out a subjective state, but they hopefully do not call for the explicit use of the fact-finders' own personal moral assessments of the particular act or actor. Callous indifference may be a better or more accurate measure of the appropriate bounds of moral responsibility, and thus criminality, than such imperfect substitutes as purpose, knowledge, or recklessness, but it seems less or even wholly unworkable.

2. Indifference as a Punishment Consideration

Maybe a better way to employ indifference analysis would be to incorporate it into consideration of punishment rather than into determination of guilt.[266] Stephen Garvey's recent account of "wicked" and "vicious" wrongs could be used to explain this.[267]

Garvey argues that wrongs, which are criminal, differ from harms, which are not, because they add a moral injury to an otherwise only material injury. That moral injury is the symbolic message of contempt, insult, dishonor, disrespect, or the like that one conveys when one considers himself free to pursue his own ends at the expense of someone else's, effectively saying "I'm better than you," or "I count but you do not."[268] According to Garvey, there are two kinds of wrongs punished by the criminal law: Wicked wrongdoers believe that what they are doing is wrong, but put the pursuit of their own ends above the call of conscience.[269] Vicious wrongdoers fail to live up to the criminal law's standard of virtue (that of a reasonable person), but do not act in defiance of their conscience and do not convey a message of contempt for their victims.[270] Rather, vicious wrongdoers may act out of weakness (an inability to exercise the self-control a virtuous person would) or mistake (failure to realize the wrong that a virtuous person would appreciate).[271] Garvey concludes that, since wicked wrongs convey a message of insult or contempt for the victim

266. This is essentially what occurred in the infamous case of *Regina v. Dudley and Stephens*, *id.*, in which dying, shipwrecked seamen resorted to cannibalism of one of their number in order to save some of their lives. After the jury was unable to reach a verdict on guilt, a specially convened court deemed the defendants criminally responsible and sentenced them to death, but the sentence was commuted to a six month prison term in view of the extreme extenuating circumstances of the particular homicide. *See* Paul H. Robinson, Criminal Law Case Studies: Teacher's Manual 23 (2002). In effect, the defendants were understood to have acted because of an overwhelming moral dilemma rather than out of callous indifference to the moral worth of their victim. This factor eventually entered into sentencing consideration, but was not considered legally relevant to the determination of guilt.

267. Stephen P. Garvey, *Two Kinds of Criminal Wrongs* (Apr. 2002) (unpublished manuscript, on file with the Fordham Law Review).

268. *Id.* at 3 (emphasis omitted).

269. *Id.* at 6.

270. *Id.* at 11-12.

271. *Id.* at 12.

and hubris in the wrongdoer, the proper penance or punishment for such wrongs should send a message of humility.[272] In contrast, since vicious wrongs convey only lack of virtue, penance for them should demonstrate efforts or resolve to learn to live up to the expected norm.[273]

When indifference causes a failure of perception or attention, it would seem that it results in a vicious wrong. Indifferent actors have made a mistake, that is, owing to their failure of perception or attention, they have failed to appreciate the wrong that a virtuous person would have understood. Arguably something like vicious wrongdoing could characterize Sansregret's act; owing to his failure to analyze the facts appropriately, he failed to appreciate, as a virtuous person would have, that he had coerced consent.

On the other hand, it could also be said that indifference to the moral worth of another characterizes the wicked wrongdoer, who acts in disregard or in contempt of that other's interest. Again using Sansregret as the example, his indifference to the moral value of his ex-girlfriend's integrity displayed a serious disregard or contempt for her interests. But the wicked wrongdoer is also supposed to have acted against his conscience. This assumes an awareness of wrongdoing supposedly lacking in one who lacks knowledge of the wrong-indicative fact. In Sansregret's case, he allegedly lacked knowledge that he had coerced consent, and so he did not act with conscious appreciation of wrongdoing. Perhaps instead he acted out of a peculiar kind of conscience, one that views it as appropriate to have intercourse with anyone under any circumstance who says they want to have sex, even if you've just beaten them and frightened them out of their wits. Garvey calls one who employs a twisted moral code, contrary to the generally accepted one, a "conscientiously wicked" wrongdoer.[274] Such a person acts immorally, but does not see it that way because he is truly ignorant of certain basic moral propositions. If Sansregret fell into this category, Garvey would view him as still culpable, because virtuous people do not suffer from such ignorance, but categorize him as a vicious rather than wicked wrongdoer.[275] It is difficult to say whether Sansregret acted more from a mistake about the facts than out of a conscientious but twisted morality. In either event, penance for the vicious wrongdoer would be in order.

If Sansregret is a vicious wrongdoer, Garvey suggests that we should punish him by having him commit to a process of self-reform that would attempt to enable him to live up to the standard of virtue the criminal law expects, rather than humble himself by showing his recognition that he is not better than his victim or others. There are

272. *Id.* at 16.
273. *Id.*
274. *Id.* at 6.
275. *Id.* at 7.

two potential problems with trying to apply Garvey's construct to this situation. First, identifying a process of self-reform that would correct errors of perception or attention or reasoning would seem at least sometimes to be confounding, especially for people who have spent a lifetime operating under flawed perceptual or analytical mindsets. Perhaps we could teach Sansregret to appreciate that women deserve respect, and that those who are terrorized are not being treated with respect. But when we get down to the level of perceptual mistakes as opposed to mistakes in judgment or reasoning, it seems more difficult to correct well-embedded, systematic flaws. This is not to say that Garvey is wrong, but only that it may be difficult to translate his theory into efficacious practice.

Second, and more problematic for resolving what to do with Sansregret and his ilk, Garvey's useful taxonomy of wrongdoing and consequently appropriate punishment assumes guilt. The trouble we began with is that some vicious wrongdoers, like Sansregret, lack the required mens rea of knowledge, and therefore will not have committed a crime under existing law. Garvey's considerations would enter the picture only if and after Sansregret were otherwise guilty of a crime; they do not readily point to a method for insuring that he would be guilty in the first instance.

Perhaps some combination of Pillsbury's idea of indifference and Garvey's idea of differential punishment would be ideal. That is, we could add indifference as a culpable mental state, and then allow only for punishments of the sort Garvey would apply to ignorant but vicious wrongdoers, punishments different from those applied to knowing, wicked wrongdoers. This amalgamation would render Sansregret guilty, but would still not alleviate all the previously discussed problems inherent in adopting an indifference standard. In short, Garvey's theory of different criminal wrongs and punishments might be usefully analyzed together with Pillsbury's indifference analysis, but it does not solve the problem of implicating some, but not too many, non-knowing but clearly bad actors.

CONCLUSION

Sometimes we encounter people who do obviously bad things, for which criminal punishment seems in order, but who do not act with the guilty mental state required for conviction of the pertinent crime. Knowledge-level crimes, for which awareness of some relevant fact must be established, seem particularly susceptible areas for such slippage to occur. Under existing rules, some bad acts—like the rape described at the outset of this paper, or the callously indifferent certification of flawed Enron financial statements that arguably led to the loss of millions in investments and pension funds—would escape criminal condemnation, unless, as in the rape case that was analyzed, judges misapply the rules to fit the facts or twist the facts to fit the

rules. These are clearly not ideal resolutions.

Several other options could result in criminal liability for such bad acts. First, we could alter the required mens rea for the crimes involved so that something less than knowledge is sufficient for conviction. However, this would mean reducing the culpable mental state for many crimes for which a knowledge requirement is still generally desirable. Second, we could alter the definition of willful blindness, a current knowledge-substitute, so that it covers these bad acts. But this would pervert a long-established doctrine, and might not serve to inculpate the desired behavior in any event. Third, we could create a wholly new culpable mental state that encompasses the state of mind actually involved. While this might be desirable in theory, there are both practical and conceptual obstacles to adopting at least one promising candidate—indifference—found in the literature. Attempts to use this indifference analysis to fashion a particularly suitable punishment instead might be more workable, but would still not solve the problem of inculpation.

It may seem disappointing to conclude that we cannot punish some clearly bad acts, at least not in a principled way, absent existing mens rea. But there is little point in adopting a cure that could prove worse than the disease.