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Mistakes

In response to Professor Curley's interesting article on *D.P.P. v. Morgan*[1] which appeared in a previous issue of *Philosophy & Public Affairs*, I shall discuss some recent developments concerning the mistake-of-fact defense in rape cases in the United States. *Morgan* was decided during April of 1975 by the highest court of appeal in Britain, the Law Lords, a court whose opinions are not precedent for any United States jurisdiction. Six months after *Morgan*, and after considerable public discussion of *Morgan* in the United States, the California Supreme Court decided *People v. Mayberry*.[2] This opinion resembles *Morgan* so closely in its legal theory that it seems reasonable to assume the California Court was at least aware of the British opinion, even though it does not cite *Morgan*. The California court based its unanimous holding exclusively upon state law, although in its own precedents in this area it has frequently argued on the basis of British authority. The principal case relied on in *Morgan* has been cited by the California Supreme Court in the two cases which are the foundation for the rule in *Mayberry*. So there is some reason to think that the timing of *Morgan* and *Mayberry* is not simply a coincidence.

The rule recognized in California is different from the rule in

1. The case in full is *Director of Public Prosecutions v. Morgan* (1975) 2 All E.R. 347, hereafter cited as *Morgan*. See E. M. Curley, "Excusing Rape" *Philosophy & Public Affairs* 5, no. 4 (Summer 1976).

2. *People v. Mayberry*, 15 Cal. 3d 143,542 P. 2d 1377, 125 Cal. Rptr. 745 (1975), hereafter cited as *Mayberry*.

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Morgan, but *Morgan* and *Mayberry* are twins. Both cases recognize for the first time in their jurisdictions a defense to rape based upon the defendant's mistaken belief in consent. The two cases provide an interesting illustration of how decisions which are closely related in doctrine can have markedly different results.

I

In *People v. Mayberry* a unanimous California Supreme Court held as a matter of law that a trial court's refusal of a request for a jury instruction regarding reasonable mistake of fact as to consent was a prejudicial error. The error required the reversal of convictions for rape and kidnapping. And a new jury instruction based on *Mayberry* is now mandated in all cases of rape and kidnapping in California.[3] The holding in *Mayberry* is not, therefore, identical with the holding in *Morgan*, which recognized the possibility of a defense based upon an *unreasonable* mistake of fact as to consent. *Mayberry* holds that in every case of rape the jury must specifically reject the defense of a *reasonable* mistake of fact as to consent. Omission of the *Mayberry* instruction in a rape case in California will form the basis for a reversal of the conviction on appeal as a matter of law.

The following set of facts was testified to by the victim at the preliminary hearing in *Mayberry*.

> On July 8, 1971, at 4:00 p.m. the victim, Nancy B. was stopped by the Defendant Franklin Mayberry as she walked to the store. The Defendant grabbed her arm, and she struggled to be released. The Defendant swore at her, tried to hit her in the face with his fists, kicked her, and struck her in the stomach with a bottle.
>
> The victim told the Defendant to leave her alone and continued to the store. She bought a newspaper at a liquor store and then

3. California Jury Instruction, Criminal 1976. "Rape-Belief as to Consent: It is a defense to 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. If from all the evidence you have a reasonable doubt whether the defendant reasonably and in good faith believed she voluntarily consented to engage in sexual intercourse, you must give the defendant the benefit of that doubt and acquit him of said charge." CALJIC 10.23 (West 1976). There is a similar new instruction regarding a mistaken belief in consent to kidnapping.

entered the Safeway Store. The Defendant suddenly accosted her again in one of the back aisles of the Safeway Store. The Defendant told her to come outside and seeing no security guard, the victim followed his directive. Once outside, the Defendant verbally abused her and struck her with his fist in the neck region. The blow knocked Miss B. to the pavement. The Defendant then told her he wanted to have intercourse and she had no choice but to comply or there would be great violence. The victim tried to dissuade the Defendant but was unsuccessful. She decided to accompany him, feeling that perhaps a police car would pass or in some other manner she might prevent the Defendant's assault. The Defendant walked her to his residence on Seventh Avenue. Once in the home, the Defendant removed his and the victim's clothing. The Defendant grabbed the victim by the hair and forced her mouth over his penis. He made her orally copulate him for about thirty minutes. The Defendant then engaged her in sexual intercourse. This lasted for a protracted period of time. While engaged in the act, the Defendant struck the victim. He banged her head against the wall and forced her head under her body almost dislocating her neck.

The Codefendant, Booker Mayberry, began to pound on the door about this time. When the Defendant Franklin Mayberry did not open the door, his brother Booker broke it down. The victim was able to dress while Franklin was distracted. The brothers engaged in an argument during which period of time Booker kept repeating that he also wanted intercourse with the victim. Booker struck the victim in the face with his fists. He also kicked her in the legs. He threw her on the bed numerous times. He choked her and when she tried to kick him he started to beat her in the face. She fell to the floor but was able to escape when the brothers began to fight. . . .[4]

The facts also showed that the victim had never seen either defendant before in her life. Three witnesses, including a police officer, testi-

4. Statement of Facts, Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, on file with the Trial Court Record at the Office of the Clerk, Alameda County Superior Court, File No. 51017, Dept. 5, *People v. Mayberry*, pp. 1-3. References to page numbers of the transcript and the surname of the victim have been omitted.

fied to seeing the victim's physical injuries immediately after the assault. The assault was immediately reported, and the fact of sexual intercourse and physical harm was documented by the medical report.

The facts also showed that in the store the prosecutrix did not call out for help or attempt to obtain the help of the clerk in the supermarket. On the walk to the defendant's apartment she did not stop anyone on the street. The defense testimony was that there were no threats, nor did the victim protest accompanying him, and that she willingly consented to intercourse. The second defendant who was not charged or convicted of rape, denied having touched the victim.

These are the facts upon which the California Supreme Court held that there should have been an instruction on a reasonable but mistaken belief as to the fact of consent. That the jury found no consent does not, after *Mayberry* and *Morgan*, show that there might not be a defense based upon a mistaken belief in consent.[5] And the extreme nature of the facts in both *Mayberry* and *Morgan* indicates, I think, that the line between a reasonable but mistaken belief as to consent and an unreasonable mistaken belief as to consent is very thin indeed.

One interpretation of *Morgan* and *Mayberry* is to say that the court expanded the consent defense in rape on a set of facts which seemed to preclude a finding of consent. The court has legitimized a defense theory which is an offshoot of the defense of consent. Those who are outraged by the decision and those who welcome it differ as to whether the court is to be characterized as expanding the consent defense in rape or as refining the definition of *mens rea* generally.

However we interpret *Mayberry* (and there has been almost no subsequent law to guide us), it is now unquestionably more difficult to obtain a conviction for rape in California. Even when force, injury, and the relationship of the parties establish there was no consent, the prosecution must anticipate a defense based upon a reasonable but

5. "We by no means intimate that such is the *only* reasonable interpretation of her conduct, but we do conclude that there was some evidence 'deserving of . . . consideration' which supported his contention that he acted under a mistake of fact as to her consent both to the movement and the intercourse." *Mayberry*, 125 Cal. Rptr. at 754. Since the California Supreme Court reversed the convictions for rape and kidnapping, they must recharacterize the events as "intercourse" and "movement."

mistaken belief in consent. Such a defense focuses the trial upon interpretations of the behavior of the victim instead of the accused.

Mayberry thus recalls judicial attitudes toward rape which, in the United States at least, have resulted in an intolerable situation. In theory, rape is a serious offense with high statutory penalties.[6] In fact, convictions have been extremely rare.[7] Police and prosecutors have regularly dismissed complaints before trial,[8] and respected commentators have argued that to protect men from "false charges" of rape is a more pressing public concern than to protect women from being sexually assaulted. This posture of the law came to be regarded by some as unacceptable at a time when even the FBI was reporting some 55,000 rapes a year.[9] Some states, primarily under pressure

6. In New York, the maximum for first-degree rape was 25 years in 1975. See N.Y. Penal Law section 130.35 (McKinney 1975).

7. Of the 56,090 rapes reported to the police in 1975, 51% resulted in an arrest. Of the adults arrested for forcible rape, 58% were prosecuted; 46% of these were acquitted or charges against them were dismissed; 42% of those prosecuted were found guilty; and 12% were found guilty of a lesser offense. Fewer than 7,000 of those charged, or 1 out of 8, were convicted in all of the United States. Federal Bureau of Investigation, *Uniform Crime Reports, 1975* (Washington, D.C. 1976), pp. 24 ff., hereafter cited as *1975 FBI Crime Reports*. In California there were 8,349 rapes reported to the police in 1973; 660 of those charged were convicted; of those 660 convicted, only some 300 received any jail time, and of those, only 145 went to state prison. See R. O'Neale, "Court Ordered Psychiatric Examination of a Rape Victim in a Criminal Rape Prosecution . . . ," *Santa Clara Law Review* 18, no. 1 (Nov. 1977). This paper reports statistics on over 400 cases reported to Bay Area Women Against Rape. In 1972, in all of New York State there were only 18 convictions for rape as against thousands of rape complaints reported to the police. See Hechtman, Practice Commentary, New York Penal Law § 130.35 (McKinney 1975).

8. Battelle, *National Police Survey* (Seattle, 1975), Table 10, p. 44. See also Battelle, *National Prosecutor's Survey* (Seattle, 1975). Both studies are available from United States Government Printing Office. See also interview material on practices in California in O'Neale, "Court Ordered Psychiatric Examination"; and J. Peters, L. Meyer, and N. Carroll, "The Philadelphia Assault Victim Study" (Final Report, 30 June 1976, ROIMH 21304), Table 31, p. 132. Available from National Institutes of Mental Health.

9. From 1970 to 1975 the number of offenses reported to the police was up 48%, and the rate per 100,000 inhabitants was up 41% (*1975 FBI Crime Reports*, p. 23). The total number of rapes reported to the police in 1975 (56,090) excludes "unfounded" reports, which the police estimate as an additional 15%. On the other hand, the United States Department of Justice Criminal Victimization Survey, based upon personal interviews with individuals in a representative national sample of 65,000 households and 15,000 commercial establishments,

from feminists, enacted statutes which redefined the offense and excluded evidence of the victim's prior sexual history in an attempt to rationalize an area of the law which had become a parody of justice.[10]

Although *Morgan* and *Mayberry* are very close in doctrine, there are important differences between the two cases. In *Morgan* the Law Lords were asked to decide a single question of law on appeal.[11] The defendants in the case had all, with the exception of the husband, been convicted both of rape and aiding and abetting in the commission of the crime of rape. The majority of the Law Lords held as a matter of law that if the defendants mistakenly and unreasonably believed that the woman in fact consented, they could not be convicted of rape. All of the Lords agreed, however, that the convictions for rape and aiding and abetting rape should not be reversed in the case before them. Thus, what the British court did with its new rule of law was significantly different from what the California court did with its new rule of law. The British opinion refused to apply the new rule to the case at hand, although one dissenting justice said that if the ruling was in favor of the defense, then the only logical result would be to overturn the convictions. The five British judges split again as to whether or not these defendants could ever have used this defense. They disagreed also on whether or not proof of nonconsent was itself inconsistent with a successful defense based upon a mistaken and unreasonable belief in consent. There seems also to be no agreement in *Morgan* about what is meant by the requirement that the defense be "honest."

The three Law Lords who held that there was a legitimate defense based upon a mistaken belief in consent, even if the belief was un-

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reported that the number of rapes in 1973 was 153,000, of which only 48.9% were reported to the police. United States Department of Justice, Law Enforcement Assistance Administration, Criminal Victimization in the United States (75-619157, May, 1976).

10. See L. Bienen, "Chart of the Rape Statutes," and "Recent Changes in the Rape Laws," in *Rape II*, *Women's Rights Law Reporter* 3, no. 3 (1977), published by Rutgers-Newark, School of Law.

11. "Whether, in rape, the defendant can properly be convicted notwithstanding that he in fact believed that the woman consented if such belief was not based on reasonable grounds." *Morgan* at 354. The color of plausibility was given to the defense of a mistaken belief in consent by the fact that the husband told the three strangers his wife would feign nonconsent. See Curley, "Excusing Rape," for discussion of *Morgan*.

reasonable, based their opinion primarily upon an English bigamy case, *R. v. Tolson* in which a mistake-of-fact defense was recognized for bigamy.[12] *Tolson* acquitted on the basis of this defense and also because the deciding judge made a number of remarks *in dicta* about the mental requirement for rape.[13] Both Professor Curley and the dissenting justices in *Morgan* point out that to recognize a mistake-of-fact defense sufficient to acquit for bigamy and then draw an analogy with a mistake-of-fact as to consent in rape is a very big jump indeed.[14] The California Supreme Court adds one intermediate step to that same chain of reasoning. *Morgan*, like *Mayberry*, makes it more difficult to prove the crime of rape by creating a totally new defense to the crime.[15] As Professor Curley points out, those who thought that *Morgan* was so bizarre on its facts that it would never have any impact as precedent should look at a case decided only a few months later.[16]

The *Morgan* decision did have specific and immediate effects which can be compared to recent American developments. The Home Secretary commissioned the Advisory Group of the Law of Rape to consider whether legislation should be drafted to amend or reverse the *Morgan* opinion.[17] The *Report* concluded that legislation was not required to overturn the result in *Morgan*, and proceeded to make a series of recommendations regarding law and procedure in rape cases in Eng-

12. *R. v. Tolson*, [1889] 23 Q.B.D. 168 (1886–80), All E.R. 26.

13. In *R. v. Tolson* Stephen J., in talking of the mental element in crime, said: " 'mens rea' means . . . in the case of rape an intention to have forcible connection with a woman without her consent." Quoted in opinion of Lord Hailsham, *Morgan* at 358.

14. Curley, "Excusing Rape," p. 338. Lord Hailsham remarks, "I myself am inclined to view *Tolson* as a narrow decision based on the construction of a statute. . . ." *Morgan* at 362.

15. The new jury instruction makes this clear as does the discussion in *Mayberry*, 125 Cal. Rptr. at 755. The jury must now specifically reject the *Mayberry* defense in every case of rape.

16. The *Morgan* defense succeeded in a case whose facts make one wonder if the publicity surrounding *Morgan* suggested the crime. The husband arranged for a friend to have intercourse with his wife to punish her. The friend's conviction was reversed as the jury found that he believed the wife consented even though there was no reasonable grounds for that belief. The husband's conviction for aiding and abetting was upheld. *R. V. Cogan, R. v. Leak*, [1975] 2 All E.R. 1059.

17. Advisory Group on the Law of Rape, *Report*, Cmnd. 6352, December 1975, hereafter cited as *Report*.

land. Parliament enacted some of the recommendations of the *Report* into law in the Sexual Offences (Amendment) Act 1976.[18] The new statute not only defines rape by statute for the first time in England, but the definition of the offense substantially limits the applicability of *Morgan*. The *Report* also recommended limitations on the admissibility of evidence regarding the prior sexual history of the complaining witness, and this recommendation became part of the new statute. The *Report* went on to say that, in cases of rape, "if the main purpose of the attack is directed to the credibility of the complainant or the witness for the prosecution, such attack should where relevant to his credibility, let in the accused's character or previous convictions subject to the discretion of the judge."[19] The new statute provides for the anonymity of victims. These positions could not be put forth in the United States, even though the admissibility of evidence concerning prior sexual behavior of the victim has been a primary target for those who have challenged rape laws here. Under interpretations of the Fifth Amendment, the admissibility of prior felony convictions depends upon whether the defendant chooses to testify as a witness in his own case. And statutes providing for the anonymity of victims have been held to violate the First Amendment.

Perhaps the discrepancy between what is currently mandated by statute in at least some states and what was rather hesitantly put forward in the *Report* can be explained by the fact that rape briefly became a political issue in the United States. Not until the *Morgan* case and the public outcry surrounding it were statutory provisions passed in Britain defining rape and limiting the admissibility of evidence regarding the victim's prior sexual history.

The irony is that the decision in *Morgan*, which was more unfavorable to victims than that in *Mayberry*, was the occasion of a *Report*

18. See Halsbury's Laws of England, Monthly Review, January 1977 (London, 1977), K 232 at 31. Sexual Offences (Amendment) Act 1976 . . . "The act defines rape as unlawful sexual intercourse with a woman who at the time of intercourse does not consent, the man knowing she does not consent *or being reckless as to whether she does*. The presence or absence of reasonable grounds for his belief that the woman was consenting may be taken into account in considering whether he so believed" (italics added). The unreasonableness of the belief will go to the honest, bona fide, and genuine nature of the belief, that is, to the defendant's credibility.

19. *Report*, p. 25.

recommending legislation which, when passed, made the British law significantly more favorable to victims. The new legislation also limited the effect of *Morgan* itself. In the United States, however, *Mayberry* occasioned almost no public commentary and resulted in a rule of law which, since it included the word "reasonable" as a qualification, was considered to be less harsh than *Morgan*. But the impact of *Mayberry* upon rape cases in California will be far more substantial than the impact of *Morgan* could ever have been in England.

One effect of *Mayberry* will be to raise a presumption of admissibility for evidence concerning the character and reputation of the victim even though such evidence was declared inadmissible by statute in California in 1975.[20] The introduction of character evidence regarding the victim's conduct was the principal basis of charges that in cases of rape the victim, not the accused, was on trial. The new statutes attempted to correct this by keeping out such evidence when it is introduced either to prove consent or to impeach credibility, unless counsel can make an independent showing of special relevance in a hearing away from the jury. The practical value of these statutes is that such evidence would have to be very strong to make it worthwhile for the defense to argue for its admissibility on a separate motion. The language of the statute, however, specifies "to prove consent." It does not say such evidence may not be admitted to prove a mistaken belief in consent. Since criminal statutes are to be interpreted narrowly in favor of the defendant, that same evidence concerning consenting sexual relations with third parties will be admissible as relevant to a mistaken belief in consent.

Thus *Mayberry* has now undermined the effectiveness of those two new statutes because evidence regarding the victim's prior sexual conduct and her reputation for "chastity" arguably become once again relevant to the defense of a reasonable but mistaken belief in consent. Other state supreme courts in jurisdictions with new evidence provisions may well follow suit. Evidence which by statute would not be admissible directly on the issue of consent itself, or on impeachment, will be admissible on the much more tenuous ground of a reasonable

20. Cal. Evid. Code sec. 1103 (West Supp. 1976); Robbins Rape Evidence Law, Cal. Evid. Code sec. 782 (West Supp. 1976).

but mistaken belief in consent. Misleading or inaccurate character evidence would also be relevant to prove a mistaken belief in consent. Since the predisposition is to admit, not keep out, evidence at trial, especially evidence which might exculpate the defendant, it seems likely the new mistake-of-fact defense will be a powerful weapon to counteract recent statutory developments.

Evidence can now be put in front of the jury which suggests that this "victim" consents to intercourse with anyone. And even if the jury does not believe that the defendant had that bona fide exculpating belief, the jury is swayed towards doubting the victim's testimony. When a jury or a judge is presented with evidence of abortion, hitchhiking, pregnancy outside of marriage, a teenage runaway, school truancy, divorce, cohabitation between the victim and another male, or drug use, they are less likely to convict for rape.[21] Some argue that this result is based on a theory of contributory fault of the victim. Others argue that what is being expressed is a punitive attitude toward changed sexual mores among young people. Whatever the reason, a conviction for rape will usually not be returned if the trial can be focused upon the victim's consenting sexual behavior or upon a life style that is not middle class. If the defense is able to play upon the social prejudices of the judge or jury and suggest that this victim deserved to be raped, the result will almost certainly be an acquittal.

The irony is compounded by the fact that the defense need not even prove that the defendant actually held a mistaken belief in consent. Under *Mayberry* the defense must only raise a reasonable doubt as to whether a reasonable mistake as to consent might have been made by the accused.[22] Thus in the United States, where a varying but significant proportion of sex offenses are decided by plea bargaining, the introduction of a *Mayberry* defense, either by case law or by statute,

21. The Battelle study found that most prosecutors (74%) thought that the admission of evidence relating to the victim's prior sexual conduct was of *major* importance in jury deliberations, Battelle, *Prosecutor's Survey*, Table 51, p. 79. See also H. Kalven, Jr., and H. Zeisel, *The American Jury*, chap. 17, "Contributing Fault of the Victim," especially pp. 249ff. and Tables 72 and 73: "The jury convicts in just 3 out of 42 cases of simple rape. . . . The figures could not be more emphatic" (pp. 253-254).

22. *Mayberry*, 125 Cal. Rptr. at 754.

will arm the defense with a totally new weapon in the charge-reduction bargain.[23] Such a bargain usually results in all sexual charges being dismissed while a guilty plea is entered to a minor count of assault. Already over half of all rape cases are bargained down. Because of *Mayberry* there will be even greater pressure upon prosecutors to bargain out the rape and kidnapping counts altogether. One may ask whether that is important so long as defendants serve some time for some offense. The answer is that society has an interest in the outcome. Society wants to know when a defendant comes before the court the third, fifth, or tenth time that the previous charges were rapes, although the convictions were for assault, especially since a conviction for a minor assault is likely to result in probation. But victims will be more uncooperative and prosecutors less likely to take rape cases to trial when the price for persisting with the prosecution is public exposure of the victim's personal life.

Perhaps the California Supreme Court considered that this result was not unfair given the recent, significant changes favoring victims. Perhaps *Mayberry* is an attempt to rebalance the equities, for this very same court in the same year outlawed Lord Hale's cautionary instruction in sex offenses with strong language.[24]

II

It might be argued that a mistake of fact with regard to consent is simply a logical extension of mistake-of-fact theory, and therefore that it always has been a possible defense in a rape case. What difference, then, do *Morgan* and *Mayberry* make?

A mistake-of-fact defense based upon a mistaken belief in consent

23. Battelle's sample of 150 prosecutors' offices in large and small counties throughout the United States reported that over half of all rape cases (54%) were plea bargained. The prosecutors in counties with a population of over one million not surprisingly plea bargained a greater proportion of rape cases (62%). All prosecutors favored even more frequent use of plea bargaining. See Battelle, *Prosecutor's Survey*, Table 52, p. 80.

24. *People v. Rincon-Pineda*, 14 Cal. 3d 864, 583 P. 2d 247, 123 Cal. Rptr. 119 (1975). Lord Hale's instruction to the jury was that the charge of rape was easy to make and difficult to disprove, and therefore the testimony of the complaining witness should be regarded "with caution."

could have been, and was occasionally, raised prior to *Mayberry*, but the defense would not have been taken seriously prior to *Mayberry* and *Morgan*. Therefore, its use in criminal cases has, in the United States at least, been limited.[25] Perhaps the explanation for *Mayberry* lies in the compelling nature of the legal arguments put forward or in the overwhelmingly persuasive precedent in support of this new defense. Then, even if one were to quarrel with the California Supreme Court for handing down the *Mayberry* rule on this particular set of facts, the rule might be justified, or even necessitated, simply as a matter of doctrine.

The mistake-of-fact defense in criminal cases has been accepted in the United States in only two types of cases: bigamy and statutory rape. For example, a reasonable but mistaken belief that one was acting justifiably in defense of another is no defense to a charge of assault.[26] Nor has it ever been the general American view that a reasonable mistake of fact as to whether or not one was still married was sufficient to acquit for bigamy. The English rule in *Tolson* has not been universally followed in the United States. Many American courts have taken the position that bigamy is a statutory offense, and intent is immaterial. States which recognize the mistake-of-fact defense in bigamy exculpate the defendant only if the mistake is such that a *reasonable person, after a thorough and honest investigation, would be justified in relying upon the incorrect information.*[27] That is not the kind of "mistake" relied upon in *Mayberry*.

Although California was not the first United States jurisdiction to recognize the mistake-of-fact defense for bigamy, its recognition in 1956 of the defense in *People v. Vogel* is now representative of the

25. A handful of dated, minor cases in Alabama raised the issue of a mistaken belief in consent as a defense. See *McQuirk v. State*, 84 Ala. 435, 3 So. 775 (Ala. 1888); *Kirby v. State*, 5 Ala. 128, 59 So. 374 (Ala. App. 1912); *Gordon v. State*, 32 Ala. 398, 26 So. 2d 419 (Ala. App. 1946). In these cases the issue of a mistaken belief in consent is sometimes confused with or equated with the issue of a mistaken belief in the absence of resistance. See also the discussion in *United States v. Short*, United States Court of Military Appeals, 4 U.S.C.M.A. 477 (1954).

26. *People v. Young*, 11 N.Y. 2d 274, 183 N.E. 2d 319 (N.Y. 1962).

27. *Alexander v. United States*, 136 F. 2d 783 (D.D.C. 1943).

minority view.[28] *Vogel* is one of the two principal cases which are the foundation for the rule in *Mayberry*.

Before deciding *Mayberry*, however, the California Supreme Court took an intermediate step which was not taken by the Law Lords in Britain. In 1964, it recognized for the first time in any United States jurisdiction a common-law defense based upon a reasonable but mistaken belief that the female in a statutory rape case was above the age of consent.[29]

Statutory rape has developed differently from forcible rape. The penalties have traditionally been less severe. Many states, particularly after the publication of the American Law Institute's Model Penal Code, enacted provisions regarding statutory rape which in effect stated that there was no offense committed if the female was not of "chaste character."[30] Some states adopted such provisions as a matter of common law. Chaste-character provisions and other "special" rules applicable only to sex offenses also became more widespread after the well-known, American legal scholar John Henry Wigmore took a strong stand on the issue in his famous *Treatise*.[31]

28. *People v. Vogel*, 46 Cal. 2d 798, 299 P. 2d 850 (1956). As in *Tolson* the chance of a serious penalty being enforced against the defendant was almost nil. The court decided the case on purely theoretical grounds.

29. *People v. Hernandez*, 61 Cal. 2d 529, 393 P. 2d 673 (1964), hereafter *Hernandez*, and Annotation, Mistake as to Age Defense, 8 A.L.R. 3d 1100 (1966). The British Sexual Offences Act of 1956, 4 and 5 Eliz. 2, c. 69, recognized a defense of mistake of fact as to age for both abduction and statutory rape where the girl is over 13 and the man under 24.

30. Model Penal Code, Art. 213 (Final Draft, 1962) § 213.6 provided in part: "It is a defense . . . for the actor to prove by a preponderance of the evidence that the alleged victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others. . . ." The comments also noted: "At common law, prior unchastity of the female *was not a defense to either forceful or 'statutory' rape*. . . . However, one can envision cases of precocious 14 year old girls and even prostitutes of this age who might themselves be the victimizers. Accordingly the draft while rejecting the concepts of 'virtue,' 'chastity' or 'good repute' *permit the defense that the girl is a prostitute*, defined in subsection (6) *to include anyone engaging in promiscuous sex relations*" (italics added). American Law Institute, Model Penal Code, Comment to 207.4 Tentative Draft No. 4, 1955. States which followed the Model Penal Code also adopted prompt complaint and corroboration requirements. See L. Bienen, "Legislative History of Rape Law in Pennsylvania," *Rape I, Women's Rights Law Reporter* 3, no. 2 (Dec. 1976): 48.

31. The 1934 Supplement to the second edition of John Henry Wigmore's

California, which did not have a Model Penal Code rape statute, had a two-tiered statute that defined rape in part as sexual intercourse with a female under 18. The principal precedents relied upon in *Hernandez* and *Morgan* were both cases of bigamy by mistake: *Vogel* in California and *Tolson* in England. Until *Hernandez* the universally accepted view in all United States jurisdictions, in spite of the unequivocal recommendation of the Model Penal Code to the contrary, was that the defendant's specific knowledge of the age of the female was not an element of the crime of statutory rape. The California Supreme Court unilaterally changed the law on that point in its own jurisdiction on a case whose facts should be summarized since *Hernandez* is the principal case relied upon for the holding in *Mayberry*.

The facts in *Hernandez* were particularly favorable to the defense. The female in question and the defendant had been living together in a consenting relationship for several months before the incident which was the occasion of the prosecution. There was no allegation of force, coercion, prostitution, or even seduction. The female was three months short of the age of consent. The court was presented with an almost perfect case for the recognition of the mistake-of-fact defense in statutory rape. The social harm seemed nil, the theoretical problem was neatly posed, the violation of law seemed a mere technicality. In some sense it could indeed be said there was no criminal intent.

The *Hernandez* court held on the basis of the California bigamy-by-mistake case that the "common law" had always recognized the mis-

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Treatise on Evidence incorporated a new section, 924a, in which the author stated categorically that there should be a presumption that all women and girls who alleged they were victims of sexual assault were either lying or fabricating the charge. The basis of this conclusion was primarily a 1915 study of pathological lying and several letters from physicians which appear to have been solicited. In the 1940 edition of the *Treatise* Wigmore reprinted as additional and independent authority for the view presented a 1937-1938 Report of the American Bar Association Committee on Improvements in the Law of Evidence. Wigmore did not mention in the *Treatise* that he himself was the chairman of that ABA committee and the author of the report which strongly endorses the position advocated in the *Treatise*. The 1970 revised edition of the *Treatise* incorporates 924a without change. Opinions of the 1970s still quote 924a as the "modern" view. See J. Wigmore, *Treatise on Evidence* 3d ed. rev. (Chadbourn, 1970), vol. IIIa, section 924a; and vol. 63 of American Bar Association, *Annual Reports* (Chicago, 1939).

take-of-fact defense, and presumably they meant British common law. *Hernandez* also cites to Model Penal Code and to the British Sex Offences Act of 1956 which, perhaps under influence of the Model Penal Code, recognized the mistake-of-fact defense as to age for statutory rape. In effect, *Hernandez* adopted the Model Penal Code provision by decision. *Hernandez* was not decided simply on the theory of criminal mistake, however. The court justified its decision with a hypothesized interpretation of the purpose of the statutory rape laws. *Hernandez* argued that the purpose of the statutory rape laws is the protection of naive, innocent, or sexually inexperienced females, who are presumed to be incapable of consenting to intercourse. Once the court so characterized the purpose of the statutory rape laws, the next step was predictable. The court then said since females below the age of consent are not in every case sexually unsophisticated, they should not always be presumed to be incapable of granting consent. The court also argued, as do the comments to the Model Penal Code, that it is "unfair" to punish young males and not females for violations of the statutory rape laws. Notice, however, that the reasoning offered in support of the mistake-of-fact defense was not based on the specific circumstances in *Hernandez* but upon hypothesized policy objectives of the statutory rape laws.

Not long after *Hernandez* the California Supreme Court decided that a defendant did not have to take the stand to present a defense based upon the reasonable but mistaken belief that the female in question was above the statutory age. This decision is cited in *Mayberry* with approval and it can be assumed that the same court would hold that the defendant need not take the stand in order to present the *Mayberry* defense of mistake of fact.[32] Once this rule is established, the defense will be applied in every case. Any pretense therefore that the decision will rest on whether the mistaken belief was actual, bona fide, genuine, or honest is completely discarded if the defendant does not take the stand. Thus, instead of being based on the direct testimony of two witnesses, each of whom can personally be evaluated by the jury, the decision will be based on a credibility contest between the vic-

32. *People v. Thomas*, 267 Cal. App. 2d 698, 73 Cal. Rptr. 590 (1968) cited in *Mayberry*, 125 Cal. Rptr. at 745.

tim of rape on the witness stand and the defense attorney. The lawyer will suggest the most plausible scenario consistent with his own set of professional ethics, a constraint which in rape cases has not proved to be of major importance.

Should a court accept any mistaken belief as a defense with regard to any aspect of the criminal nature of an incident? Take, for example, a defendant who says, "I always beat up my partners. They *always* protest *a little*. Most women are masochists. Of course I had never met this one before, but *they all* really love it in spite of the broken noses and bruises. For me sex and violence go together. And this one didn't love it. That's my mistake."[33] This type of argument seems to be rejected by courts because, aside from its inherent implausibility, the court is then asking the ghoulish question: What is reasonable in the rape situation? The potential rapist may say, "Everyone who's scared will scream. She didn't scream, therefore, I didn't think she was scared." To define a standard of reasonableness in this situation seems impossible. Clinical research on sex offenders shows that rapists as a group are basically hostile, aggressive, anti-social, or simply lacking in customary social restraints.[34] Therefore, their subjective mistaken beliefs should hardly be the basis for excuse.

33. This argument may seem farfetched, but essentially the same position was put forward in polite diction in a 1952 article which is still widely cited: "Many women, for example, require as part of preliminary 'love play' aggressive overtures by the man. Often their erotic pleasure may be enhanced by, or even depend upon, an accompanying physical struggle. . . . The anxiety . . . may cause her to flee from the situation of discomfort, either physically by running away, or symbolically by retreating to such infantile behavior as crying. . . ." From "Comment: Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard," *Yale Law Journal* 62 (1952): 66-68. (Internal footnotes omitted.)

34. In an extensive retrospective study involving interviews with convicted sex offenders, it was found that severe and excessive violence, more than was required for simple sexual gratification was a characteristic of more than 82% of the rapes committed by the rapists interviewed. P. Gebhard, J. Gagnon, W. Pomeroy, and C. Christenson, *Sex Offenders: An Analysis of Types* (New York, 1965). Other studies confirm this, for example: "The Rapist most often has a particularly strong male dominant identification and expresses his sex-need gratification by forcible and punitive sexual behavior directed toward the adult female who symbolically represents the hostile mother image of his childhood. *His attack may be instigated by impaired judgment resulting from intoxica-*

In *Mayberry* and *Morgan*, however, a jury had already determined there was no consent. That finding of fact was not overturned in either case. Therefore the question before the California Supreme Court was: Given that the act accomplished was sexual intercourse without consent, what is the intent requirement with regard to consent? Even though the defense in *Mayberry* argued that the subjective belief of the rapist was not the only determination for the court, the court did not seem to adopt that position.[35] The court also construed the general intent sections of the California Penal Code.[36]

Another problem with *Mayberry* is that it does not directly address the standards for the good faith or honesty of the mistake-of-fact defense. *Morgan* has some discussion on this issue, although the justices in *Morgan* seemed to assume defendants will always take the stand to testify as to the bona fide and honest nature of their mistaken belief. *Mayberry* implies that good faith and honesty will be monitored by the reasonableness requirement. But that is not a realistic expectation when it is likely that the defendant will not take the stand and have his personal credibility assessed by the jury. In statutory rape cases when the defendant does not take the stand to present the defense, the court asks the jury to decide whether the female in question "looked like a grown woman." What will be the equivalent question put to the jury when a *Mayberry* defendant does not take the stand? On the defense of mistake as to age, it is arguable there is an "objective

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tion, mental illness, seductive behavior on the part of the victim, or rage reaction against the victim . . ." (italics added). N. G. Mandel et al., "The Sex Offender in Minnesota," as quoted by W. Hausman, M.D., *Report on Sex Offenders* (Dept. of Psychiatry, University of Minnesota, Nov. 1972) pp. 82-83.

35. "While we reverse the rape and kidnapping convictions because of the courts' failure to give the requested mistake-of-fact instructions, *those instructions pertained to Franklin's state of mind . . .*" (italics added). *Mayberry*, 125 Cal. Rptr. at 756.

36. Both *Mayberry* and *Hernandez* construed sections 20 and 26 of Cal. Penal Code (1970). "If the defendant entertains a reasonable and bona fide belief that prosecutrix voluntarily consented to accompany him and to engage in sexual intercourse, it is apparent he does not possess the wrongful intent that is a prerequisite under Penal Code section 20. . . ." *Mayberry*, 125 Cal. Rptr. at 753. The language of section 20 is the Model Penal Code language: ". . . there must exist a union, or joint operation of act and intent, or criminal negligence . . . ," quoted in *Mayberry* at 125 Cal. Rptr. at 752. Notice the court did not find that the defendant's behavior met the criminal negligence standard.

standard" of a reasonable mistake on which a jury may base its finding. How can the jury make that determination with regard to a mistaken belief in consent without direct testimony from the defendant as to what he thought?

The entire development of the mistake-of-fact defense has been based upon a notion that the objective reasonableness of a mistake will exculpate the defendant. The mistake must be one that you or I or anyone could reasonably have made under the circumstances. A mistake as to consent is not such a mistake and it will be judged in an entirely different manner from the traditional mistake cases. In *Mayberry* the court remarks that in *Hernandez* they considered the matter of intent "within a context similar to that presented in the instant case." The two kinds of mistake were in fact very different.

Whether a person is 17 and 9 months or 18 years of age is purely a question of fact and, furthermore, a question of fact as to which reasonable people in some circumstances could be mistaken. Similarly one could reasonably be mistaken about the technical validity of a divorce, that one was in possession of stolen goods, or about whether one was committing adultery. The court will make a judgment about the plausibility, honesty, and reasonableness of the mistake in each circumstance and weigh that against the policy considerations advanced by not enforcing the statute. A jury can decide whether or not people such as themselves would have made the same mistake.

The question of whether the defendant had a reasonable but mistaken belief in consent is not always one of pure fact, let alone a question that can be answered by applying some sort of objective standard—especially when violence or threat of violence is involved.

Even in jurisdiction such as California where consent is nominally a "fact" to be determined by the jury, can there ever be a reasonable "mistake" as to that fact? Consent has always been a conglomerate of policy considerations, most of which have little to do with the victim's subjective state of mind. The jury decides whether or not the victim consented according to its assessment of her credibility, objective criteria such as force or physical injury, the victim's description of events, the relationship of the parties, or the physical location of the incident. That being the case, it can be an item about which the accused could be mistaken only when he is mistaken as to the sub-

jective consent of the victim at the specific time. And cases where the subjective consent of the victim is a real issue are very rare.

Morgan, *Tolson*, *Vogel*, and *Hernandez* are all mistake-of-fact cases, but each presents a different issue. They provide a shaky foundation for the result in *Mayberry*, which does not seem mandated by the power of precedent.

III

In *Mayberry*, the California Supreme Court may have responded to administrative pressures which had little to do with either the circumstances of the individual case or with legal doctrine. The record shows, for example, that the case was on the trial calendar and was continued thirteen times.

The Court of Appeal, the intermediate appellate court, unanimously held that while the trial court must instruct on any defense theory which finds support in the evidence, no matter how incredible the theory, the evidence presented by the prosecution in this case, if it was believed by the jury, was clearly subject to only one interpretation. In the opinion of this court, "*there was no consent, nor could* [*the defendant*] *have reasonably believed there was consent.*"[37] The court concluded that a defense based upon a reasonable but mistaken belief in consent would be impossible in the face of a jury verdict convicting of rape and kidnapping. In other words, the intermediate court took a position analogous to *Morgan* and said: this particular set of facts could not support what might be a valid defense in another case.

The appellate court also noted that the mistake-of-fact instruction needed rewriting and that the burden of proof under the mistake-of-fact defense was ambiguous. It pointed out that by taking the case the state supreme court could clarify the law. The California Supreme Court could have simply affirmed or overturned the result at the court of appeal with or without opinion. Instead it decided to hear argument on the case and asked for supplemental briefs on the mistake-of-fact defense.

37. Unpublished Opinion, California Court of Appeal, 1st Appellate District, Division 3 (filed Aug. 22, 1974) 1 Crim/12490, on file as an appendix to the Record on Appeal, Office of the Clerk of the California Supreme Court, p. 3.

Perhaps the California Supreme Court was concerned that the *Mayberry* rule on mistake would have no teeth if they did not reverse the convictions for rape and kidnapping. Perhaps *Morgan* suggested a way in which to formulate the new rule and simultaneously resolve certain ambiguities in that area of the law. Since mistake of fact as to consent was recognized as a defense to rape for the first time, the court set out the requirements of proof for the defense. The defense must only raise a reasonable doubt as to whether or not the defendant might have had a bona fide and reasonable belief in consent.

The facts indicate that in *Mayberry* the California Supreme Court was willing to go far indeed to recognize and institutionalize a new, special defense to rape. Its reason for doing so is open to question. Perhaps the court assumed that the case, if strong, would be retried. In fact, the prosecutor's office did attempt to retry the case, but the victim had been traumatized by the incident and the trial. She was described by her psychiatrist as still being in a highly labile state, which required her mother to live with her. Because of her mental condition the prosecutor asked to have her original testimony at the preliminary hearing and trial admitted on the retrial so that she would not have to testify again about the incident. The same judge who had presided at the first trial and not sentenced for rape or kidnapping refused this procedural request. The charges against both defendant and co-defendant were therefore dropped. No conviction could have been obtained given the victim's psychological condition. Thus, she suffered intense and perhaps permanent psychological harm from the rape and the trial, while the defendant "won" after four years during which time he was detained for a little less than two years. His conviction for rape and kidnapping was reversed in order to create a rule which perhaps even the court did not believe applied in his own case.

Why has the legal system allowed this outcome? What interests does it serve for society? The defense is granted a new and powerful rule which will be important in the legal definition of intent in all criminal cases, and especially in rape and kidnapping. The prosecution must find some way to live with a rule which has created a wholly new branch of the defense of consent to rape. The illegitimate, or even

merely strategic, use of this defense must now be anticipated in every case of rape. The use of the word "reasonable" in its ruling hardly makes *Mayberry* better than *Morgan*.

Some will see *Mayberry* as a landmark in which the California Supreme Court once again champions the rights of defendants. It could backfire, as *Morgan* did, and result in the passage of legislation in California which modifies its holding. Even so, courts in other states, particularly courts which followed *Hernandez*, may well adopt the *Mayberry* rule even though it is not mandated by the interests of justice to defendants. The cases in which a defendant was actually mistaken about a victim's subjective consent rarely, if ever, come to the authorities. The defense of consent still has more than enough leeway to protect defendants from being unfairly convicted of rape.

The mistake-of-fact defense cannot be justified as simply another chip in the plea-bargaining process or a trick to allow the defense to summon up the societal prejudices of the jury. If not its purpose, *Mayberry*'s effect will be to nullify the new evidence provisions, and for this reason alone the case should be explicitly overruled by statute. But aside from its purpose or ultimate effect, *Mayberry* will be used strategically in every case, from a case of rape in an alleyway or an elevator to a case of burglary and rape. How could any competent defense attorney neglect that avenue towards a possible acquittal, even when there is clearly no evidence of a mistaken belief in consent on the facts? Every possible basis of acquittal must be aggressively pursued, and the threat of an aggressive, time-consuming defense is a principal cornerstone of the plea-bargaining system.

Mayberry is thus a strong argument for enacting legislation which defines a new offense and totally abandons the traditions and terminology of rape. Rape laws have not protected women. Nor have they been administered to safeguard the interests of victims. For a variety of cultural reasons the system has preferred to excuse and condone acts of sexual aggression rather than convict for rape. There is nothing to lose by getting rid of the entire concept of rape and its attendant psychological baggage. *Mayberry* and *Morgan* both show that even in extreme circumstances where a jury has found that the victim did not consent to sexual intercourse, a court may discover a theoretical basis for overturning a conviction for rape. The results in cases such

as *Morgan* and *Mayberry* are dictated by untenable attitudes about appropriate female sexual roles and confusion between acts of sexual assault and consenting sexual relations among adults. Neither *Morgan* nor *Mayberry* were legitimate mistake-of-fact cases, nor were they cases in which there was absence of criminal intent. Statutes should be drafted and passed which redefine the crime and its defenses and limit the discretion of judges. Higher penalties will not rationalize the rape laws—if anything they would be unproductive. There should be some correspondence, however, between the criminal event and its characterization in the judicial process.

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