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MIRRORING *MENS REA*: THE "TWO PATHWAYS TO CONVICTION" ARGUMENT IN CANADIAN SEXUAL ASSAULT LAW

SAAMBAVI MANO†

I. INTRODUCTION

Under the Canadian sexual assault regime, a defendant can be exculpated on the basis of the common law defence that they held an honest but mistaken belief that the complainant communicated consent to the sexual activity in question.[1] The task of interpreting this defence was largely left to courts until 1992, when Parliament amended the sexual assault provisions in the *Criminal Code*.[2] Although these amendments were primarily aimed at enacting Charter-compliant rape shield provisions,[3]

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1 See *R v Barton*, 2019 SCC 33 at para 86 [*Barton*]; *R v Ewanchuk*, 1999 CanLII 711 at para 42 (SCC) [*Ewanchuk*]; *Pappajohn v The Queen*, [1980] 2 SCR 120 at 147, 1980 CanLII 13 (SCC) [*Pappajohn*].

2 See Bill C-49, *An Act to amend the Criminal Code (sexual assault)*, 3rd Sess, 34th Parl, 1992 (assented to 23 June 1992), SC 1992, c 38 [*Bill C-49*]; *Criminal Code*, RSC 1985 c C-46.

3 Rape shield provisions are meant to limit the use of evidence of a complainant's sexual history to discredit their complaints. In *R v Seaboyer*, 1991 CanLII 76 (SCC) [*Seaboyer*], the Supreme Court struck down the previously enacted rape shield provisions as contrary to ss 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Many feared that *Seaboyer* would leave a gap in the law of sexual assault that would ultimately dissuade complainants from coming forward, but less than a year after *Seaboyer*, Parliament introduced the 1992 amendments to fill that gap.

they also introduced a series of statutory bars to prevent defendants from raising the defence of mistaken belief in communicated consent in certain circumstances, including where:

> (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting . . . [4]

The 1992 amendments were heralded by some as a turning point in the law of sexual assault.[5] This may well have been the case for the new rape shield provisions, which clearly reflect Parliament's stance that evidence of a complainant's sexual history is rarely relevant and deserves particular scrutiny.[6] But recent cases in Ontario and British Columbia have raised the question of whether the 1992 amendments, and more specifically, the reasonable steps requirement, went so far as to modify the essential elements of sexual offences in the name of protecting sexual integrity.

In these cases, the Crown has put forth the following argument. Certain sexual offences in the *Criminal Code*—including sexual assault and sexual interference—have long been interpreted as requiring proof that the defendant knew or was reckless or wilfully blind to the relevant fact, whether it be consent or age (the "knowledge element").[7] However, following the 1992 amendments to the *Criminal Code*, if a

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4 *Criminal Code*, *supra* note 2, s 273.2(b) [the "reasonable steps requirement"].

5 See e.g. Women's Legal Education and Action Fund, "Submission on Bill C-49, An Act Respecting Sexual Assault" (May 1992), online: <leaf.ca/submission/submission-act-respecting-sexual-assault/>; Martha Shaffer, "The Impact of the Charter on the Law of Sexual Assault: Plus Ça Change, Plus C'est La Même Chose" (2012) 57:2 SCLR (2d) 337 at 339–40.

6 See *Bill C-49*, *supra* note 2 (which states "the Parliament of Canada believes that at trials of sexual offences, evidence of the complainant's sexual history is rarely relevant and that its admission should be subject to particular scrutiny, bearing in mind the inherently prejudicial character of such evidence", Preamble, para 6).

7 See *R v Carbone*, 2020 ONCA 394 at para 123 [*Carbone*]; *Ewanchuk*, *supra* note 1 at para 42.

defendant cannot point to any evidence upon which a trier of fact may find that they took reasonable steps to ascertain the relevant fact, the defendant is barred as a matter of law from raising the defence of mistaken belief.[8] In those circumstances, the Crown argues that there is no room for reasonable doubt about whether the knowledge element for the sexual offence has been satisfied because the defendant possesses a culpable mental state.[9] The theory underlying this submission is that, in the aftermath of the 1992 amendments, the only non-culpable mental state is honest, mistaken belief in communicated consent or age.

If accepted, the Crown's argument would establish two independent pathways to conviction for certain sexual offences:

1) Proof that the defendant did not take reasonable steps to ascertain the relevant fact and proof of the other essential elements of the offence; or
2) Proof that the defendant knew or was reckless or wilfully blind to the relevant fact and proof of the other essential elements of the offence.

Some courts have accepted this argument, finding that the contours of the defence parallel the knowledge element of the relevant sexual offence.[10] Other courts have rejected this line of reasoning, appealing to the "bedrock principle" that the Crown must prove each element of an offence beyond a reasonable doubt and that disproving a defence cannot establish a conviction.[11]

The focus on this bedrock principle is understandable. It carries great force as a constitutionally protected component of the presumption of innocence.[12] Accordingly, it presents the easiest route to understanding objections to the Crown's

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8 See *R v Morrison*, 2019 SCC 15 at paras 116, 119–21 [*Morrison*].

9 See e.g. *R v HW*, 2022 ONCA 15 [*HW*]; *Carbone*, *supra* note 6; *R v Jerace*, 2021 BCCA 94 [*Jerace*]; *R v Angel*, 2019 BCCA 449 [*Angel*]; *R v MacIntyre*, 2019 CACM 3 [*MacIntyre*]; *Morrison*, *supra* note 8.

10 See e.g. *Angel*, *supra* note 9 at para 44; *Jerace*, *supra* note 9 at paras 38–41.

11 *Morrison*, *supra* note 8 at para 85; *HW*, *supra* note 9 at para 59; *MacIntyre*, *supra* note 9 at para 54.

12 See e.g. *R v Oakes*, 1986 CanLII 46 at paras 20–21 (SCC); *Morrison*, *supra* note 8 at para 85; *HW*, *supra* note 9 at para 64.

argument that the lack of an air of reality to the defence of mistaken belief could automatically establish the knowledge element of the offence.

But more credit may be due to the Crown's argument when it is placed in context. The defence of mistaken belief is not just any defence. It is a mistake of fact defence, which has long been understood as "simply a denial of *mens rea*."[13] With this context in mind, it is understandable why the Crown would submit that the unavailability of the defence of mistaken belief automatically establishes the *mens rea*, the element that the defence was meant to negate. If the defence is structured to parallel the *mens rea*, the latter is "necessarily affected" when the former is unavailable.[14]

In this article, I argue that the foundational observation that the mistake of fact defence mirrors the *mens rea* provides a cogent response to this "two pathways to conviction" argument in the context of sexual assault. I begin with a brief overview of the sexual assault regime in Canada. I then review the two pathways to conviction argument as it has been presented in recent cases and extract two camps of judicial responses to this argument: one camp rejects the argument and demands strict separation of the knowledge element and the defence, while the other accepts the submission and maintains that the 1992 amendments imported an objective element into the fault analysis.

In response to this judicial debate, I outline two potential explanatory prongs for the two pathways to conviction argument, both of which must, in my view, fail. The structural explanation suggests that, since the mistake of fact defence always mirrors the *mens rea* of the underlying offence, modification of the former will necessarily affect the latter. I argue that this explanation must be rejected because the statutory reasonable steps requirement maintains a gap between the fault standards for the knowledge element of sexual assault and the defence of mistaken belief in communicated consent. The legislative intent explanation suggests that, in amending the

13 *Ewanchuk*, *supra* note 1 at para 44.

14 *Morrison*, *supra* note 8 at para 209, Abella J, dissenting.

defence of mistaken belief in communicated consent, Parliament demonstrated legislative intent to modify the *mens rea* of sexual assault accordingly. In other words, the government signalled to courts that the failure to take reasonable steps to ascertain communicated consent is a culpable mental state. I argue that this explanation must be rejected because it is unsupported by the mechanics of the mistake of fact defence and the legislative history of paragraph 273.2(b).

One preliminary point about comparing sexual offences is worth noting at the outset. Although this article aims to evaluate the two pathways to conviction argument in the context of sexual assault, a great deal of the case law discussing the interaction between the reasonable steps requirement and the *mens rea* was decided in the context of other sexual offences, such as sexual interference and child luring. The case law relating to these other sexual offences offers crucial insight into how courts are responding to this argument about the mistake of fact defence. However, it is important to note that other sexual offences are not identical in structure to the offence of sexual assault. For example, in the context of the offences of sexual interference and invitation to sexual touching, a defendant must be able to show that they took *all* reasonable steps to ascertain the age of the complainant in order to raise the defence of mistaken belief in age.[15] Furthermore, to assess the two pathways to conviction argument in relation to these other sexual offences, it would also be important to contextualize the reasonable steps requirement within the case law discussing the evolution of the *mens rea* of those offences. For these reasons, while I draw from case law pertaining to other sexual offences throughout this article, my analysis will focus on sexual assault and the defence of mistaken belief in communicated consent.

II. THE SEXUAL ASSAULT REGIME

The 1992 amendments and judicial interpretation of the resulting provisions have given rise to a somewhat confusing sexual assault regime. The *actus reus* of sexual assault is fairly

[15] See *Criminal Code*, *supra* note 2, ss 151–52.

straightforward. It requires "proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent."[16] However, the *mens rea* for sexual assault has been the subject of some debate, in large part because the *Criminal Code* does not explicitly state a fault element for the offence.[17]

In recent years, the Supreme Court has repeatedly affirmed that the *mens rea* of sexual assault contains two elements: intention to touch; and knowing of, being reckless of, or being wilfully blind to a lack of consent on the part of the complainant.[18] Notably, the latter element is subjective, which ushers in a host of consequences for the law of sexual assault. For example, on a strict subjectivist approach to this element, a defendant who fails to turn their mind altogether to the question of consent must be acquitted. Since a subjective *mens rea* requires at least recklessness on the part of the defendant, they would need to appreciate some level of risk and decide to take that risk.[19] In practice, however, Canadian courts have not taken such a strict approach to recklessness when dealing with sexual offences, and a defendant who failed to turn their mind to consent will likely be found to have been reckless with respect to the lack of consent in most circumstances.[20] In *R v Carbone*, which was decided in the context of invitation to sexual touching,

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16 *Ewanchuk*, *supra* note 1 at para 25. See also *R v GF*, 2021 SCC 20 at para 25 [*GF*]; *Barton*, *supra* note 1 at para 87; *R v JA*, 2011 SCC 28 at para 23 [*JA*]; *R v Handy*, 2002 SCC 56 at para 118.

17 See Hamish Stewart, "The Fault Element of Sexual Assault" (2022) 70:1 Crim LQ 4. See also Michael Plaxton, "Sexual Assault's Strangely Intractable Fault Problem" (2022) 70:1 Crim LQ 33.

18 See *R v Park*, 1995 CanLII 104 at para 39 (SCC) [*Park*]; *Ewanchuk*, *supra* note 1 at para 42; *GF*, *supra* note 16 at para 25; *JA*, *supra* note 16 at para 24; *HW*, *supra* note 9 at para 20.

19 See *Carbone*, *supra* note 7 at para 125; Plaxton, *supra* note 17; Toni Pickard, "Culpable Mistakes and Rape: Relating *Mens Rea* to the Crime" (1980), 30 UTLJ 75 at 96–97. See also Don Stuart, *Canadian Criminal Law: A Treatise*, 7th ed (Toronto: Carswell, 2020) at 236, 257–58.

20 See e.g. *Carbone*, *supra* note 7 at paras 126–27, 131; *R v WG*, 2021 ONCA 578 at para 69; *HW*, *supra* note 9 at paras 76–77. See Plaxton, *supra* note 17, for a good discussion of recklessness in the context of the *mens rea* of sexual assault.

Doherty JA held that recklessness encompasses "reckless indifference".[21] He found that a defendant's failure to turn their mind to the complainant's age is a choice to treat age as irrelevant to the decision to engage in the sexual activity and to assume the risk associated with that choice.[22]

This subjective element of the *mens rea* is further muddled by the defence of mistaken belief in communicated consent. This defence involves an assertion that the defendant did not have the requisite *mens rea* because they mistakenly believed that the complainant consented to the sexual activity. Accordingly, the defence is fundamentally an assertion of a mistake of fact, which is "more accurately seen as a negation of guilty intention than as the affirmation of a positive defence."[23] In other words, the mistake of fact defence presents one way of raising a reasonable doubt as to an element of the offence.

However, this defence is limited by the statutory bars contained in section 273.2 of the *Criminal Code*:

> **Where belief in consent not a defence**
>
> **273.2** It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> **(a)** the accused's belief arose from
>
> **(i)** the accused's self-induced intoxication,
>
> **(ii)** the accused's recklessness or wilful blindness, or
>
> **(iii)** any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;
>
> **(b)** the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or

21 *Carbone*, *supra* note 7 at para 127.

22 See *ibid* at paras 122–27.

23 *Pappajohn*, *supra* note 1 at 148; *Ewanchuk*, *supra* note 1 at paras 43–44.

> **(c)** there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.[24]

The interaction between the *mens rea* and some of these statutory bars is well-established. For example, paragraph 273.2(c) prevents the defendant from raising the defence where there is no evidence that the complainant communicated their voluntary agreement to the activity by words or conduct. This provision runs parallel to subsection 273.1(2), which provides that, for the purpose of establishing the *mens rea*, no consent is obtained as a matter of law if that voluntary agreement is communicated by someone other than the complainant;[25] if "the complainant expresses, by words or conduct, a lack of agreement to engage in the activity;"[26] or if the complainant retracts previously communicated consent by expressing, through "words or conduct, a lack of agreement to continue to engage in the activity."[27] The Supreme Court also affirmed in *R v Barton* that, for the purposes of the *mens rea*, consent requires that the complainant "affirmatively communicated by words or conduct her agreement to engage in [the] sexual activity with the accused."[28] In this sense, the statutory bar in paragraph 273.2(c) mirrors the statutory provisions and common law applicable to the *mens rea* of sexual assault.

However, other statutory bars are more complicated. In particular, the reasonable steps requirement in paragraph 273.2(b) finds no parallel in section 273.1 or in the common law guidance on the *mens rea* of sexual assault. Notably, while the question of whether consent is communicated does not implicate the question of the fault standard applicable to the defence, the reasonable steps requirement does. Since the determination of whether a defendant took "reasonable steps" to ascertain consent would require an assessment of the steps a reasonable

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24 *Criminal Code*, *supra* note 2, s 273.2.

25 *Ibid* at s 273.1(2)(a).

26 *Ibid* at s 273.1(2)(d).

27 *Ibid* at s 273.1(2)(e).

28 *Barton*, *supra* note 1 at para 90, citing *Ewanchuk*, *supra* note 1 at para 49.

person would take in light of the circumstances known to the defendant at the time, the defence of honest but mistaken belief in communicated consent has been described as carrying a "subjective-objective" standard.[29]

Whether this subjective-objective standard affects the *mens rea* of sexual assault is, of course, the very subject of this article. But at least some scholars have argued that paragraph 273.2(b) may have changed the *mens rea* by introducing a quasi-objective fault standard.[30]

III. THE "TWO PATHWAYS TO CONVICTION" ARGUMENT AND JUDICIAL RESPONSES

This interplay between paragraph 273.2(b) and the *mens rea* of sexual assault forms the basis of the submission that the reasonable steps requirement presents a second "pathway to conviction." On this argument, the statutory reasonable steps requirement creates an independent basis on which to establish a culpable mental state.[31] A similar argument is often raised in the context of sexual offences involving children, which contain a similar statutory bar on the defence of mistaken belief in age.[32] The two pathways to conviction are perhaps best expressed as follows.

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29 See e.g. *Barton*, *supra* note 1 at para 104; *R v Cornejo*, 2003 CanLII 26893 at para 22 (ONCA), citing Kent Roach, *Criminal Law*, 2nd ed (Toronto: Irwin Law, 2000) at 157–58; Elizabeth A Sheehy, "Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women", in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 483 at 492–93; Christine Boyle & Marilyn MacCrimmon, "The Constitutionality of Bill C-49: Analyzing Sexual Assault as if Equality Really Mattered" (1998) 41 Crim LQ 198 at 214; Lucinda Vandervort, "The Prejudicial Effects of 'Reasonable Steps' in Analysis of *Mens Rea* and Sexual Consent: Two Solutions" (2018) 55:4 Alta L Rev 933 at 935.

30 See e.g. Boyle & MacCrimmon, *supra* note 29 at 214; Rosemary Cairns Way, "Bill C-49 and the Politics of Constitutionalized Fault" (1993), 42 UNBLJ 325 at 330.

31 See *HW*, *supra* note 9 at paras 5, 8.

32 See e.g. *Morrison*, *supra* note 8 at para 9; *R v George*, 2017 SCC 38 at para 8 [*George*]; *Angel*, *supra* note 9 at paras 48–51.

Parliament has established that, to demonstrate an air of reality to the defence of mistaken belief in communicated consent, the defendant must point to evidence upon which a reasonable trier of fact, acting judicially, could find that the defendant took reasonable steps to ascertain consent.[33] Where there is no evidence upon which the trier of fact could find that the defendant took reasonable steps to ascertain consent, the defence must not be left with the jury. Alternatively, where the defendant demonstrates an air of reality to the defence, but the Crown establishes beyond a reasonable doubt that the defendant failed to take reasonable steps, the defence must not be left with the jury. In either case, since the defence cannot be made out, there is no need for the Crown to establish that the defendant knew of, was wilfully blind to, or was reckless as to the absence of the complainant's communicated consent because the defendant could not have had a non-culpable mental state.

Accordingly, the two pathways to conviction argument refers to two different culpable mental states: knowledge, wilful blindness, or recklessness as to the absence of the complainant's consent, or the failure to take reasonable steps to ascertain consent. On this argument, proof of either would be sufficient to establish the knowledge element of the offence.

Appellate-level judicial responses to this argument have fallen into two camps. The first camp rejects the argument and demands the strict separation of the knowledge element of the *mens rea* and the defence of mistaken belief. In *R v Morrison*, which was decided in the context of the child luring offence,[34] the trial judge took the view that the relevant provision contemplated two independent pathways to conviction: belief that the other party was under the age of 16 or the failure to take reasonable steps to ascertain the other party's age. A majority of the Supreme Court held that the statutory bar on the defence of mistaken belief in age in subsection 172.1(4) does not provide an "independent pathway to conviction" but merely limits a

33 See *Sheehy*, *supra* note 29 (discussing the history of the role of the reasonable steps requirement in establishing an air of reality to the defence of mistaken belief in communicated consent at 499–503).

34 *Criminal Code*, *supra* note 2, s 172.1.

defence.[35] Moldaver J, writing for the majority, explained that the main effect of subsection 172.1(4) "is to impose an evidentiary burden on the [defendant] regarding reasonable steps" where the defendant wishes to raise the affirmative defence of mistaken belief in age.[36] He noted that since the Crown maintains the persuasive burden with respect to the *mens rea* of the offence, the statutory bar on the defence does not prevent the defendant from making full answer and defence.[37]

In support of this interpretation, Moldaver J also laid out the "bedrock principle" of criminal law that the Crown must prove all of the essential elements of the offence beyond a reasonable doubt. He found that if the defendant's failure to discharge an evidentiary burden with respect to a defence could provide a freestanding basis for conviction, that bedrock principle would be stripped of any meaning.[38]

More recently, the Court of Appeal for Ontario applied the reasoning in *Morrison* to the offence of sexual assault in *R v HW.* In that case, the Crown forwarded a version of the two pathways to conviction submission, arguing that where the defence of mistaken belief in communicated consent is unavailable, it necessarily follows that the defendant knew of or was wilfully blind or reckless to the absence of consent. The Court rejected this argument for three interrelated reasons. First, it found that the argument infringes the bedrock principle identified in *Morrison* and noted that, "[a]s a matter of law, an accused cannot be convicted simply for failing to establish a defence."[39] The legal burden of the knowledge element remains on the Crown even if the negation of the defence makes conviction a "virtual certainty".[40]

Second, the Court acknowledged the presence of overlap between the knowledge element and the defence of mistaken

35 *Morrison*, *supra* note 8 at para 82.

36 *Ibid* at para 84.

37 *Ibid*.

38 *Ibid* at para 85.

39 *HW*, *supra* note 9 at para 62.

40 *Ibid* at para 69, citing *Morrison*, *supra* note 8 at para 88.

belief in communicated consent but noted that "overlap is one thing. Reading a requirement to prove an element of an offence as being legally contingent upon a particular defence being raised is quite another."[41] It held that the Supreme Court's formulation of the knowledge element, including in decisions that came after *Morrison*, does not support the conclusion that the burden to prove that element disappears if the defence is unavailable to the defendant.[42]

Third, the Court found that while there is some symmetry between the knowledge element and the defence, that symmetry is not complete because it is possible to envisage situations where knowledge of non-consent is an issue but belief in consent is not.[43] By way of example, the Court flagged the hypothetical raised by Bennett JA in *R v MacIntyre*:

> [W]here there is evidence that the accused was involuntarily intoxicated, the accused may not have known that the complainant was not consenting, but would also not have an honest but mistaken belief in consent. Thus, in cases in which the accused, through no fault of their own, has *no* belief about the complainant's consent, failure to instruct the [jury] on the knowledge element of *mens rea* could deprive them of a defence.[44]

In such a case, while the defence of mistaken belief in communicated consent would not apply, the knowledge element of the *mens rea* would be a live issue. The Court found that the theoretical possibility of a scenario where the defence of mistaken belief in communicated consent was unavailable, but the knowledge element was still a live issue, underscored the importance of maintaining separation between the defence and the *mens rea*.[45]

By contrast, the second camp of judicial responses to the two pathways argument accepts the submission, positing that

41 *HW*, *supra* note 9 at para 69.

42 See *ibid* at para 70.

43 See *ibid* at paras 78–81.

44 *MacIntyre*, *supra* note 9 at para 65 [emphasis in original].

45 See *HW*, *supra* note 9 at para 81.

Parliament, through statutory intervention, has imported an objective element into the fault analysis for the related offences. *R v George* was decided in the context of subsection 150.1(4), which provides that a defendant may not raise the mistaken belief in age defence for certain sexual offences unless they took all reasonable steps to ascertain the complainant's age. The Supreme Court held that, in enacting subsection 150.1(4), Parliament had imported an objective element into the fault analysis to enhance protections for youth.[46] Accordingly, the Court held that where the defendant raises an air of reality to the defence of mistaken belief in age, the Crown can obtain a conviction by proving beyond a reasonable doubt that the defendant "(1) did not honestly believe the complainant was at least 16 (the subjective element); or (2) did not take 'all reasonable steps' to ascertain the complainant's age (the objective element)".[47]

There was no discussion in *George* of the broader implications of this conclusion, which may explain in part why the *Morrison* majority read *George* down and limited its effects to its unique factual context. However, Justice Abella relied on the holding in *George* in her dissent in *Morrison* to find that reasonable steps requirements import objectivity into the *mens rea* of sexual offences. She found that, "[g]iven the symbiotic relationship between *mens rea* and mistake of fact, the *mens rea* is necessarily affected where the availability of a mistake of fact 'defence' is legislatively constrained by an objective aspect", such as a reasonable steps requirement.[48] Justice Abella explained the importation of an objective element into the *mens rea* as follows:

> Criminal law jurisprudence has recognized the effect of reasonable steps provisions on the fault element of an offence. Offences which include such limits have been described as "subjective-objective", since the determination of whether an accused took "reasonable steps" to ascertain age is based on what steps a reasonable person would take in light of the circumstances known to the accused at the time. Although the

46 See *George*, *supra* note 32 at para 8.

47 *Ibid*.

48 *Morrison*, *supra* note 8 at para 209, Abella J, dissenting.

> analysis depends on the information subjectively known to the accused, it remains an objective inquiry because it is assessed from the perspective of a reasonable person: the accused is "held up to a standard of reasonable conduct".[49]

Accordingly, Justice Abella held that once mistake of fact is put in issue, the Crown can establish the knowledge element "by proving *either* that the accused believed the complainant to be under the relevant age/not consenting, *or* that the accused failed to take all reasonable steps to ascertain age, or reasonable steps to ascertain consent".[50]

Given the discord between *George* and the *Morrison* majority, appellate courts were left with conflicting Supreme Court precedents on the two pathways to conviction argument: *George*, which appears to endorse the argument in the context of some sexual offences, and *Morrison*, which clearly rejects it. When called to resolve this conflict, the British Columbia Court of Appeal has favoured the former perspective while the Court of Appeal for Ontario has preferred the latter.

In *R v Angel*, the British Columbia Court of Appeal held that *Morrison* did not alter the legal landscape in relation to the offence of sexual interference. The Court drew a distinction between child luring, the offence at issue in *Morrison*, and sexual interference, which was at issue in *Angel*.[51] Unlike child luring, which was designed to allow police officers to conduct sting operations by posing as children on the Internet, sexual interference always involves real children. For this reason, recklessness can satisfy the *mens rea* of sexual interference but cannot do so for child luring.[52] Accordingly, the Court held that "a finding that an accused failed to take reasonable steps in [the child luring context] may or may not establish the requisite *mens rea* for child luring" and "[b]y contrast, in the context of sexual interference . . . a finding that an accused failed to take all

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49 *Ibid* at para 210 [citations omitted].

50 *Ibid* at para 211 [emphasis in original].

51 *Angel*, *supra* note 9 at paras 44, 51.

52 *Ibid* at para 45. See also *Morrison*, *supra* note 8 at para 83.

reasonable steps leads inevitably to conviction."[53] The Court concluded that, upon the negation of the mistake of age defence for an offence that always involves children, a conviction would be a "virtual certainty" because the "contours of [the] defence . . . parallel the fault element of [the] offence," as seen in *George*.[54]

After distinguishing *Morrison*, the Court found in *Angel* that the "all reasonable steps" requirement in subsection 150.1(4) imports an objective element into the *mens rea*, such that once a trial judge concludes that the defendant failed to take all reasonable steps to ascertain age, there is no need to explicitly revisit the knowledge element of the *mens rea*. The Crown would simultaneously meet the burden of proving that the mistaken belief in age defence does not apply and the burden of establishing the fault element for sexual interference: knowledge of, wilful blindness to, or reckless indifference as to age.[55]

Shortly after *Angel*, the Court of Appeal for Ontario released its decision in *Carbone*. The Court decided that, following *Morrison*, the Crown cannot prove the requisite *mens rea* for the offences referred to in subsection 150.1(4) by merely disproving the defence of mistaken belief in age. Accordingly, to obtain a conviction, the Crown must prove that the defendant had the requisite state of mind with respect to the other party's underage status: knowledge, wilful blindness, or, for some of the offences, recklessness.[56] The Court found that, since recklessness is still a subjective state of mind, there is a gap between the *mens rea* and the reasonable steps requirement in the defence.[57] Justice Doherty, writing for the majority, suggested that trial judges proceed with the following three steps:

> Step 1: The trial judge will first determine whether there is an air of reality to the s. 150.1(4) defence, that is, is there a basis in the

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53 *Angel*, *supra* note 9 at para 45.

54 *Ibid* at para 44. Interestingly, the Court also likened the *mens rea* of such offences to the *mens rea* of sexual assault, which similarly can be established by proof of recklessness.

55 *Ibid* at para 49.

56 See *Carbone*, *supra* note 7 at para 128.

57 *Ibid* at paras 130–31.

> evidence to support the claim the accused believed the complainant was the required age and took all reasonable steps to determine the complainant's age.
>
> Step 2: If the answer to step 1 is no, the s. 150.1(4) defence is not in play, and any claim the accused believed the complainant was the required age is removed from the evidentiary mix. If the answer at step 1 is yes, the trial judge will decide whether the Crown has negated the defence by proving beyond a reasonable doubt, either that the accused did not believe the complainant was the required age, or did not take all reasonable steps to determine her age. If the Crown fails to negate the defence, the accused will be acquitted. If the Crown negates the defence, the judge will go on to step 3.
>
> Step 3: The trial judge will consider, having determined there is no basis for the claim the accused believed the complainant was the required age, whether the Crown has proved the accused believed (or was wilfully blind) the complainant was underage, or was reckless as to her underage status. If the answer is yes, the trial judge will convict. If the answer is no, the trial judge will acquit.[58]

When called to resolve the conflict between *Angel* and *Carbone*—and by implication, the conflict between *George* and *Morrison*—the British Columbia Court of Appeal maintained that there are, in certain circumstances, two pathways to conviction for sexual interference and sexual assault. In *R v Jerace*, the Court explained:

> I agree that in principle, there may be cases where the two pathway approach could be insufficient. If a defence was raised (and had an air of reality) that could raise a reasonable doubt notwithstanding the failure of the defence in s. 150.1(4), it would be necessary for the Crown to disprove the defence, and a charge based on the two pathway approach would be inadequate. For example, in *R. v. MacIntyre*, 2019 CMAC 3, Justice Bennett, sitting as a justice of the Court Martial Appeal Court, suggested that involuntary intoxication short of automatism might negate the *mens rea* of a general intent offence like sexual assault. If this were so (and I cite this example for illustrative purposes only), it

[58] *Ibid* at para 129.

> may be necessary for the judge to instruct the jury that this defence must be disproven by the Crown beyond a reasonable doubt in order to convict.[59]

Since the defendant did not raise any other defences in *Jerace*, the Court found that the Crown could prove the knowledge element of sexual interference or sexual assault by showing either that the defendant had knowledge of age "or that in the circumstances known to the accused at the time, the [defendant] failed to take all reasonable steps to ascertain . . . age."[60] While the Court moderated the effects of *Angel* by noting that the availability of other defences might render the two pathways approach insufficient, it maintained that there are some circumstances in which the failure to take reasonable steps presents a second route to conviction.

It is clear, then, that these two camps are approaching the two pathways to conviction argument with fundamentally different views on how closely the defence of mistaken belief mirrors the *mens rea* of the relevant sexual offences. One camp maintains that statutory reasonable steps requirements import objectivity into the fault analysis of the offence, while the other does not. One camp believes that any "gap" between the defence and the *mens rea* is marginal, and that conviction will be a "virtual certainty" once the defence is negated, while the other camp is not willing to overlook that gap. In the remainder of this article, I argue that a closer look at the nature of the mistake of fact defence and its interaction with the *mens rea* requirement offers unique insight into the viability of the two pathways to conviction argument and may help bring the debate between the two camps to a close.

IV. MIRRORING *MENS REA*

As seen in cases like *Morrison* and *HW*, the traditional rejection of the two pathways to conviction argument involves an appeal to the bedrock principle that the Crown must prove all elements of an offence beyond a reasonable doubt. However, a deeper look at the basic structure of the mistake of fact defence reveals an

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59 *Jerace*, *supra* note 9 at para 38.

60 *Ibid* at paras 39–41.

interesting facet of the argument and of the offence of sexual assault.

It has long been accepted that the mistake of fact defence mirrors the *mens rea* of the underlying offence.[61] In other words, establishing a mistake of fact involves negating the *mens rea*. The two pathways to conviction argument is effectively an attempt to invert this reasoning: when the Crown has disproved that alleged negation of the *mens rea* beyond a reasonable doubt, the *mens rea* has been established. This argument is particularly attractive in the context of sexual assault. The relevant element of the *mens rea* is whether the defendant knew that the complainant was not consenting. If the Crown proves beyond a reasonable doubt that the defendant did not hold an honest but mistaken belief that the complainant was consenting, it is difficult to imagine what more the Crown would need to establish in order to show knowledge of, or wilful blindness or recklessness as to, the complainant's consent.

This also appears to be consonant with the bedrock principle, since the argument is rooted not in the defendant's failure to prove a defence, but rather in the Crown's proof beyond a reasonable doubt of the absence of an honest but mistaken belief in communicated consent. Furthermore, since the mistake of fact defence simply involves raising a reasonable doubt regarding *mens rea*, the claim that the two pathways to conviction argument would allow a defendant to be convicted for failing to establish a defence loses its lustre. After all, raising a reasonable doubt regarding *mens rea* is a tactical burden that every defendant bears in a criminal courtroom.[62]

On the other hand, as stated by Justice Abella in her *Morrison* dissent, Parliament has "statutorily defin[ed] the parameters of a permissible mistake of fact".[63] In other words, the legislature has tacked on statutory bars to what was once viewed as a straightforward mistake of fact defence, such that the defence no

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61 See e.g. *Ewanchuk*, *supra* note 1 at para 44.

62 See e.g. Stuart, *supra* note 19 at 177, citing Glanville L Williams, *Criminal Law (The General Part)*, 2nd ed (London: Stevens & Sons Limited, 1961) at 888.

63 *Morrison*, *supra* note 8 at para 214, Abella J, dissenting.

longer perfectly mirrors the *mens rea* prescribed by courts. Even if the two pathways to conviction argument were acceptable under a typical mistake of fact defence, it becomes far more complicated when the legislature has stepped in to modify the defence but not the offence itself.

As will be argued, the structural observation that the mistake of fact defence mirrors the *mens rea* of the offence reveals the unique appeal of the two pathways to conviction argument and also provides the foundation for its rejection.

A. Mistake of Fact

Mistake of fact has not always been recognized as a valid defence to a criminal charge. In the early stages of the development of common law criminal jurisprudence, the only available defence was involuntariness. The argument was framed so as to negate causation rather than to negate any mental element of the offence.[64] However, the principle that criminal liability should depend upon moral guilt soon emerged, and this principle was used to widen the scope of the involuntariness defence to include mistakes of fact. The rationale was that a defendant who acted under mistake was not acting voluntarily.[65]

This line of reasoning eventually developed into the doctrine of mistake of fact. In *R v Tolson*,[66] one of the oldest and most prominent appellate decisions on the law of mistake, Justice Cave stated:

> At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act, has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim "actus non facit reum, nisi mens sit rea." Honest

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64 See William O Russell & JW Cecil Turner, *Russell on Crime*, 12th ed, vol 1 (London: Sweet & Maxwell, Limited, 1964) at 71.

65 *Ibid*, citing Sir Matthew Hale, *The History of the Pleas of the Crown*, vol 1 (Philadelphia: Robert H Small, 1847) (asserting that "[b]ut in some cases *ignorantia facti* doth excuse, for such an ignorance many times makes the act itself morally involuntary" at 42).

66 *R v Tolson*, [1889] 23 QBD 168, [1886–90] All ER Rep 26 [*Tolson* cited to QBD].

> and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy.[67]

The maxim described by Justice Cave, which loosely translates into "an act does not render a man guilty of a crime unless his mind is equally guilty",[68] is indeed foundational for understanding the mistake of fact doctrine. When an offence requires proof of a particular mental state, and the defendant is operating under a faulty assumption of fact that prevents them from forming that mental state, the defendant cannot be convicted of the charged offence.[69] A defendant who raises this defence is effectively seeking to demonstrate the Crown's failure to prove the *mens rea* beyond a reasonable doubt.[70] It is for this reason that some suggest that this defence simply restates the bedrock principle that the prosecution must prove every element of an offence.[71]

The clearest example of this defence arises in the context of murder. If the defendant shoots another person with a gun they believe to be a toy, and that person dies of their injuries, the defendant would be able to argue that they did not possess the requisite subjective foresight of death to be convicted of murder.[72]

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67 *Ibid* at 181. While English common law sources recognize a defence of honest and *reasonable* mistake of fact, Canadian law allows for an honest but *unreasonable* mistake to exculpate a defendant. See *Morrison*, *supra* note 8 at para 103. See also *R v Darrach*, 1998 CanLII 1648 (ONCA) [*Darrach*]. However, the Supreme Court recognized in *Pappajohn* that "[i]t will be a rare day when a jury is satisfied as to the existence of an unreasonable belief": *Pappajohn*, *supra* note 1 at 156.

68 *Tolson*, *supra* note 66 at 181 [translated by author]. See also Jonathan Law and Elizabeth A Martin, eds, *A Dictionary of Law*, 7th ed (Oxford University Press, 2014) sub verbo "actus reus non facit reum nisi mens sit rea".

69 See Morris Manning & Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 5th ed (Markham: LexisNexis Canada, 2015) at 427.

70 See Stuart, *supra* note 19 at 311, 324.

71 See Manning, Mewett & Sankoff, *supra* note 69 at 427.

72 *Ibid*. See also *R v Martineau*, [1990] 2 SCR 633 at 646, 1990 CanLII 80 (SCC) [*Martineau*].

While it can be helpful to think of the doctrine of mistake of fact as negating an element of the offence, it nonetheless maintains the essential burden structure of a defence. The defendant must raise an air of reality to the existence of a mistake of fact, following which the Crown must disprove the defence beyond a reasonable doubt.

It is important to differentiate between mistakes of fact and mistakes of law, since the latter do not form a valid defence.[73] Mistakes of law include mistakes about the existence, meaning, scope, or application of the law and mistakes about the legal significance of facts.[74] In the context of sexual assault, this includes mistaken beliefs about the law of consent, including the belief that silence, passivity, or ambiguous conduct constitutes consent.[75] By contrast, mistakes of fact include evidence about the "subjective factors which may have caused an accused to entertain a belief in a fallacious set of facts."[76] Indeed, it is precisely because the Crown would not have knowledge of such subjective factors that mistake of fact is an issue raised by the defendant.

One final point about the mistake of fact defence is worth emphasizing. Since the defence mirrors the *mens rea*, depending on the factual circumstances and the nature of the alleged mistake of fact, the Crown may be able to simultaneously negate the mistake of fact defence and establish the relevant element of the *mens rea*. For example, if the defendant in the example above were charged with second degree murder, and the Crown proved beyond a reasonable doubt that the defendant believed the gun was real, this could both negate the defence and establish the subjective foresight of death element of the offence.

However, disproving the mistake of fact defence will not always establish the relevant *mens rea* element. Take the example of an importer who is caught re-entering Canada with a kilogram

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73 See *Criminal Code*, *supra* note 2, s 19.

74 See Lucinda Vandervort, "Sexual Assault: Availability of the Defence of Belief in Consent" (2005) 84:1 Can Bar Rev 89 at 93; *Molis v R*, [1980] 2 SCR 356 at 362, 1980 CanLII 8 (SCC).

75 See *Ewanchuk*, *supra* note 1 at para 51.

76 *Pappajohn*, *supra* note 1 at 148.

of cocaine. If they argue that they thought it was a package of baking soda, and the Crown disproves this defence beyond a reasonable doubt, this does not necessarily establish that the importer knew that the substance was cocaine. The importer may nonetheless have held a belief that the substance was innocuous or may not have turned their mind to the contents of the package at all. In these circumstances, the Crown would have to go a step further and prove that the importer knew the package contained cocaine.

B. The Defence of Honest but Mistaken Belief in Communicated Consent

Unlike "pure" mistake of fact defences, the defence of mistaken belief in communicated consent is subject to a series of statutory bars that impact its availability. Perhaps most importantly, the introduction of a reasonable steps requirement alters the conceptual harmony between the defence and the offence. While the *mens rea* of sexual assault has remained subjective,[77] the mistake of fact defence now carries a subjective-objective standard.[78]

This modification raises several preliminary questions about the status of the defence of mistaken belief in communicated consent. First, can we still say that the defence "mirrors" the knowledge element of the *mens rea* of sexual assault, such that it can properly be termed a mistake of fact defence?[79] It is important to contextualize this often-repeated refrain about

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77 See *Park*, *supra* note 18 at para 39; *Ewanchuk*, *supra* note 1 at para 42; *GF*, *supra* note 16 at para 25; *JA*, *supra* note 16 at para 24; *HW*, *supra* note 9 at para 20.

78 *Criminal Code*, *supra* note 2, s 273.2.

79 Notably, this question does not engage the s 7 issues raised in *R v Hess*, 1990 CanLII 89 (SCC) because Parliament has not removed the mistake of fact defence altogether. It has imposed limitations on the defence, and thus has not contravened the Supreme Court's guidance in *R v Vaillancourt*, [1987] 2 SCR 636 at 652, 1987 CanLII 2 (SCC) [*Vaillancourt*] that, at a minimum, a defence of due diligence must always be open to a defendant who risks imprisonment upon conviction. This question is a conceptual one, about whether we can fairly judge the defence of mistaken belief in communicated consent using the mistake of fact framework.

mirroring or paralleling the *mens rea*. The real function of this shorthand phrase is to convey that this type of defence prevents the defendant from forming the requisite *mens rea*. The defence does not need to mirror the *mens rea* for any independent purpose; the concept of "mirroring" serves as a proxy for negating the *mens rea*.

Accordingly, the answer to this first question depends on whether the defence still offers a route to negating the *mens rea*. This in turn depends on whether the defence maintains a subjective component despite the reasonable steps requirement, since the knowledge element of the *mens rea* is subjective, requiring proof of recklessness at a minimum. The existing case law establishes that the belief that forms the foundation of the defence does not need to be reasonable in itself, so long as the defendant takes reasonable steps. In other words, the defendant can be exculpated on the basis that they took reasonable steps but nonetheless made an honest but *unreasonable* mistake about the presence of consent.[80] Accordingly, the defence still mirrors the knowledge element of the *mens rea* because it maintains a subjective component. Of course, in practice, it is unlikely that a trier of fact would find that the defendant took reasonable steps but made an unreasonable mistake regarding the presence of consent.[81] But since that route to acquittal remains available, it cannot be said that the defence no longer carries a subjective component.

Second, and relatedly, does the introduction of an objective element to the defence of mistaken belief in communicated consent contravene section 7 of the *Charter* by allowing for conviction on the basis of negligence?[82] The Court of Appeal for Ontario held in *R v Darrach* that it did not need to consider whether sexual assault is one of the "very few" offences that carries such a high degree of stigma that its *mens rea* component

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80 See *Darrach*, *supra* note 67 at paras 88–90; *Morrison*, *supra* note 8 at para 103.

81 See *Pappajohn*, *supra* note 1 at 156.

82 See *Darrach*, *supra* note 67 at para 84; *Morrison*, *supra* note 8 at para 78.

must carry a subjective standard.[83] It found that the reasonable steps requirement does not render the offence of sexual assault a negligence-based crime because the requirement is "personalized according to the subjective awareness of the accused at the time", does not require *all* reasonable steps to be taken, and, as discussed above, does not require that the mistaken belief be reasonable.[84] Similarly, in *Morrison*, a majority of the Supreme Court held that, even assuming that child luring is the type of offence that requires a purely subjective *mens rea* under section 7, the reasonable steps requirement does not depart from that standard because it does not allow for conviction on the basis of negligence.[85]

It is clear, then, that as it is currently interpreted, the defence of mistaken belief in communicated consent remains a mistake of fact defence and likely does not contravene section 7 of the *Charter*. With this context in mind, I will turn to the submission that the reasonable steps requirement presents a second pathway to conviction for sexual assault. There are two potential explanatory prongs to this argument that I will address in turn. The first turns on the structure of the mistake of fact defence and the second turns on the legislative intent behind paragraph 273.2(b).

1. The Structural Explanation

One way of understanding the two pathways to conviction argument turns on the observation that the mistake of fact defence mirrors the *mens rea* of the offence. If the defence and the relevant element of the offence are structured to parallel each other, then negating the defence should establish the relevant element of the offence. As discussed above, even when applied to "pure" mistake of fact defences, the argument that negating a mistake of fact defence establishes the relevant *mens rea* element is not foolproof. There are conceivable circumstances in which

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83 See *Darrach*, *supra* note 67 at para 85. See also *Vaillancourt*, *supra* note 79 at 653.

84 See *Darrach*, *supra* note 67 at para 89.

85 See *Morrison*, *supra* note 8 at paras 79, 92.

disproving a pure mistake of fact defence will not necessarily establish the relevant *mens rea* element. However, the argument is much more problematic when there are additional statutory bars on the availability of the defence that widen this gap between the defence and the *mens rea*.

In the context of other defences, the significance of negating a defence is limited to the availability of the defence. In other words, negating a defence is only relevant insofar as it prevents the defendant from being exculpated on the basis of that defence. Accordingly, negating the defence can, in theory, encompass anything from establishing that it is not available to the defendant due to a statutory bar to disproving the defence beyond a reasonable doubt. By contrast, the concept of negating a defence holds independent significance in the context of mistake of fact defences. Since the mistake of fact defence is meant to mirror the *mens rea*, once the Crown negates the defence, it should in theory be able to establish the *mens rea* in most cases. It is therefore important to parse out the core of the mistake of fact defence, since disproving that core should get the Crown very close, in most cases, to establishing the relevant element of the *mens rea*.

This particular mistake of fact defence is focused on honest but mistaken beliefs in communicated consent. Whether the defendant took reasonable steps may be significant to, but is not determinative of, this core question. It cannot be said, then, that the Crown negates the defence of mistaken belief in communicated consent when it proves that the defendant failed to take reasonable steps.[86] As the Supreme Court stated in *Barton*:

> [T]he defence is ultimately one of an "honest but mistaken belief in communicated consent", not one of "reasonable steps". Ultimately, if the Crown fails to disprove the defence beyond a

[86] See e.g. *Barton*, *supra* note 1 (after the defendant raises an air of reality to the defence, "the onus would then shift to the Crown to negative the defence, which could be achieved by proving beyond a reasonable doubt that the accused failed to take reasonable steps" at para 123).

> reasonable doubt, then the accused would be entitled to an acquittal.[87]

When the Crown proves that the defendant failed to take reasonable steps, it might be said to have negated the statutory prerequisite to the defence and thus barred the defendant from raising the defence. But it does not negate the defence itself in the sense of disproving the inverse of the relevant *mens rea* element. This is precisely why the Crown cannot claim that the knowledge element of the *mens rea* has been made out when it proves that the defendant failed to take reasonable steps. This is also why the defence of mistaken belief in communicated consent still mirrors the *mens rea*. To negate the defence, and to get anywhere close to making out the knowledge element of the *mens rea*, the Crown must go further and show that the defendant did not hold an honest but mistaken belief in communicated consent.

Notably, some of the other statutory bars in section 273.2 do not widen the gap between the defence and the *mens rea* because they are directly reflected in the fault element of the offence, whether prescribed by statute or pronounced by courts. For example, the bar in subparagraph 273.2(a)(ii) prevents a defendant from raising this defence where their belief arose from recklessness or wilful blindness. This, of course, mirrors two of the three culpable mental states for sexual assault.[88] Similarly, paragraph 273.2(c) prevents a defendant from raising the defence where there is no evidence that the complainant communicated their consent by words or conduct. As discussed above, this statutory bar finds parallels in the statutory provisions outlining when no consent is obtained as a matter of law and in the common law jurisprudence on the *mens rea* of sexual assault. Given that these statutory bars mirror the fault element, negating these bars assists in establishing the *mens rea*. By contrast, the reasonable steps requirement finds no parallel

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87 *Ibid* at para 123.

88 See e.g. *Park*, *supra* note 18 at para 39; *Ewanchuk*, *supra* note 1 at para 42; *GF*, *supra* note 16 at para 25; *JA*, *supra* note 16 at para 24; *HW*, *supra* note 9 at para 20.

in the statutory provisions or common law jurisprudence on the *mens rea*.

Ultimately, the refrain, as put by Moldaver J in *Barton*, is "no reasonable steps, no defence" and not "no reasonable steps, no acquittal".[89] Just as the Crown's inability to prove that the defendant failed to take reasonable steps "does not lead automatically to an acquittal",[90] the Crown's proof that the defendant failed to take reasonable steps does not lead automatically to a conviction. The trier of fact must go on to consider whether the Crown has proven beyond a reasonable doubt that the defendant knew of or was reckless or wilfully blind to a lack of communicated consent. Accordingly, the reasonable steps requirement is better understood as a statutory limitation on the mistake of fact defence and not a second pathway to conviction for sexual assault.

2. The Legislative Intent Explanation

The second explanation for the two pathways to conviction argument turns on the legislative intent behind the 1992 amendments. This justificatory prong can be explained fairly simply. Since the mistake of fact defence mirrors the *mens rea*, changes to the substance of the defence, such as the introduction of a reasonable steps requirement, would be reflected in the *mens rea*. Accordingly, the enactment of paragraph 273.2(b) demonstrates legislative intent to modify the *mens rea* of sexual assault. The reasonable steps requirement not only places a statutory limitation on the defence, but it also signals a shift to a subjective-objective *mens rea*.

This explanation is certainly appealing from a structural perspective. On this view, the defence of mistaken belief in communicated consent would perfectly mirror the *mens rea* of sexual assault, such that negating the defence would automatically establish the relevant element of the *mens rea*. This approach would also render the failure to take reasonable steps a culpable mental state, which would bar defendants from

89 *Barton*, *supra* note 1 at para 104.

90 *Ibid* at para 123.

advancing the often-problematic arguments that arise at the gap between the unavailability of the defence and the knowledge element of the *mens rea*. In particular, this approach would prevent defendants from circumventing the defence and attempting to negate the *mens rea* by arguing that they did not give *any* thought to the presence or absence of consent. Since the minimum *mens rea* of recklessness requires the defendant to have appreciated some level of risk and made the decision to take that risk, a defendant could argue that, because they did not advert to consent, they did not appreciate any level of risk.[91] Recognizing the failure to take reasonable steps as a culpable mental state would nip this type of argument in the bud.

The legislative intent explanation is also logically compelling on its face. One of the main objectives of the 1992 amendments was to protect and promote sexual integrity and autonomy.[92] The reasonable steps requirement was implemented to prevent defendants from raising problematic arguments like the one outlined above. Surely, then, Parliament could not have intended for defendants to be able to claim ignorance to consent. Parliament must have intended to signal that the failure to take reasonable steps to ascertain communicated consent is a culpable mental state.

This legislative intent explanation has been adopted by the British Columbia courts, and by Justice Abella in *George* and *Morrison*. In her dissent in *Morrison*, Justice Abella explains:

> Given the symbiotic relationship between *mens rea* and mistake of fact, the *mens rea* is necessarily affected where the availability of a mistake of fact "defence" is legislatively constrained by an

91 See e.g. *Carbone*, *supra* note 7 at paras 125–26, 131. The Court of Appeal for Ontario circumvented this issue in *Carbone* by finding that, in most cases, proceeding without regard to the relevant fact (in *Carbone*, age) reflects a decision to treat that fact as irrelevant and to take the associated risk. However, the Court acknowledged that there are circumstances in which the failure to advert to a complainant's age should not be characterized as a decision to treat the complainant's age as irrelevant to their conduct (*ibid*).

92 See *JA*, *supra* note 16 at para 72.

> objective aspect which, in this case, is the requirement to take reasonable steps to ascertain age.[93]

However, the relationship between mistake of fact and *mens rea* is more aptly described as *parasitic* rather than symbiotic. The defence draws its content—and its relevance—from the *mens rea* of the offence. After all, it is not just any mistake of fact that exculpates a defendant. The mistake of fact must go to the relevant element of the *mens rea*. In addition, as noted in the discussion above regarding the structural explanation, while establishing the mistake of fact defence negates the *mens rea*, negating the mistake of fact defence does not necessarily establish the *mens rea*. This indicates that the *mens rea* of an offence is not similarly dependent on the mistake of fact defence.

Furthermore, creating a reasonable steps requirement for a mistake of fact defence is a rather roundabout way to modify the *mens rea* of an offence. If Parliament wanted to create an objective or a subjective-objective *mens rea* offence, thereby criminalizing the failure to take reasonable steps to ascertain consent, it could have amended the provisions of the offence itself. In fact, it was suggested to the Legislative Committee on *Bill C-49* that Parliament create a separate offence of negligent sexual assault with a corresponding reduction in the maximum penalty, as with the amendments to the offence of arson in 1990.[94] However, Parliament rejected this call for a separate negligence-based offence of sexual assault. Where Parliament has considered and rejected the option to create an objective *mens rea* offence, a judicial interpretation that relies on the statutory defence to modify the *mens rea* is fundamentally untenable.

Indeed, opponents *and* proponents of the reasonable steps requirement appeared to understand that a reasonable steps

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93 *Morrison*, *supra* note 8 at para 209.

94 House of Commons, *Minutes of Proceedings and Evidence of Legislative Committee on Bill C-49, an Act to amend the Criminal Code (sexual assault)*, 34-3, No 1A (14 May 1992) at 21; House of Commons, *Minutes of Proceedings and Evidence of Legislative Committee on Bill C-49, an Act to amend the Criminal Code (sexual assault)*, 34-3, No 6 (2 June 1992) at 23–24 (Don Stuart). See also Stuart, *supra* note 19 at 336.

requirement would not modify the *mens rea* of sexual assault. For example, the Criminal Lawyers' Association of Ontario, which advocated against the inclusion of a reasonable steps requirement, maintained that even if such a requirement was to be included in the amendments, it would not alter the duty of the Crown to prove the knowledge element beyond a reasonable doubt.[95] The Women's Legal Education and Action Fund, which supported a reasonable steps requirement, accepted that the Crown would maintain its onus to prove the knowledge element, and that the defence of mistaken belief in communicated consent would be a "fallback position".[96]

It is also noteworthy that Parliament expressly modified the *mens rea* in accordance with other statutory bars on the defence of mistaken belief in communicated consent. For example, paragraph 273.2(c), which prevents the defendant from raising the defence where there is no evidence of the complainant's voluntary agreement, finds parallels in subsection 273.1(2), which sets out the circumstances in which no consent is obtained as a matter of law for the purpose of establishing the *mens rea*. There was nothing stopping Parliament from including a similar provision in subsection 273.1(2) stating that no consent is obtained if the defendant failed to take reasonable steps to ascertain consent. The fact that it declined to do so cannot be ignored in interpreting the relevant statutory provisions.

Finally, enforcing an *implicitly* negligence-based sexual assault offence would risk contravening section 7 of the *Charter* on the existing Supreme Court jurisprudence. In *Re BC Motor Vehicle Act*, the Court held that a law enacting an absolute liability offence violates section 7 if it has the potential to deprive the defendant of life, liberty, or security of the person.[97] In doing so, the Court "elevated *mens rea* from a presumed element . . . to a

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95 House of Commons, *Minutes of Proceedings and Evidence of Legislative Committee on Bill C-49, an Act to amend the Criminal Code (sexual assault)*, 34-3, No 1 (14 May 1992) at 60 (Marlys Edwardh).

96 House of Commons, *Minutes of Proceedings and Evidence of Legislative Committee on Bill C-49, an Act to amend the Criminal Code (sexual assault)*, 34-3, No 2 (19 May 1992) at 10 (Sheila McIntyre).

97 *Re BC Motor Vehicle Act*, 1985 CanLII 81 at para 75 (SCC).

constitutionality required element" and "inferentially decided that even for a mere provincial regulatory offence *at least* negligence was required, in that *at least* a defence of due diligence must *always* be open to an accused who risks imprisonment upon conviction."[98] In *R v Vaillancourt*, the Court affirmed that, in the absence of an express legislative stipulation, negligence is not sufficient to establish the *mens rea* for such offences for section 7 purposes.[99] Given that Parliament declined to expressly stipulate that negligence would satisfy the *mens rea* of sexual assault, any court seeking to find that the enactment of paragraph 273.2(b) modified the *mens rea* would need to reconcile that position with this line of case law from the Supreme Court.

It is clear, then, that the legislative intent explanation cannot support the two pathways to conviction argument. The structure of the mistake of fact defence weakens this explanation and Parliament's rejection of a negligence-based sexual assault offence completely incapacitates it. Accordingly, it cannot be said that the enactment of a statutory bar on the defence of mistaken belief in communicated consent was intended to modify the *mens rea* of sexual assault.

V. CONCLUSION

The reasonable steps requirement has become one of the most contentious aspects of sexual assault law. However, at the time of its enactment, paragraph 273.2(b) was largely regarded as a peripheral amendment to the sexual assault regime in the midst of the sprint to reinstate the rape shield provisions struck down in *Seaboyer*.[100] The legislative debates, the submissions to the Legislative Committee, and the preamble to *Bill C-49* reveal that the main focus of the legislation was the implementation of

98 *Vaillancourt*, *supra* note 79 at para 27 [emphasis in original].

99 See *Vaillancourt*, *supra* note 79 at paras 27–28, citing *R v Sault Ste Marie*, [1978] 2 SCR 1299 at 1309–10, 1978 CanLII 11 (SCC).

100 The entire legislative process took less than a year. *Seaboyer* was released on August 22, 1991, and *Bill C-49* was proclaimed in force on August 15, 1992. See Stuart, *supra* note 19 at 333.

constitutionally compliant rape shield provisions.[101] More than 30 years later, the initially unassuming reasonable steps requirement is calling into question the most essential element of the offence of sexual assault.

In this article, I have argued that a closer examination of the structure of the mistake of fact defence helps explain why the defence of mistaken belief in communicated consent has not modified the *mens rea* of sexual assault, and by consequence, why the current sexual assault regime does not allow for conviction on the basis of a defendant's failure to take reasonable steps to ascertain consent. However, this is not a particularly satisfactory conclusion to draw about the state of Canadian sexual assault law. It is becoming increasingly clear that there is a disconnect between our understanding of consensual sexual activity and the legal tools provided by the existing sexual assault regime.[102] Some argue that the time is ripe for the creation of a lesser offence of negligent sexual assault with a corresponding reduction in the maximum penalty.[103] Others argue that the fault element can simply be restated as the failure to reasonably advert to consent, which suggests that the existing penalties are appropriate for an objective fault standard.[104] Regardless of the perspective one takes, the preliminary question of whether the fault element should remain subjective deserves further consideration.

The legislative process behind *Bill C-49* sparked important debates about the relevance of evidence of a complainant's sexual history and the nature of a defendant's right to make full answer and defence in sexual assault cases. While some organizations made submissions to the Legislative Committee on the impact of the reasonable steps requirement, interested parties must be afforded an opportunity to make comprehensive submissions on the implications of lowering the fault standard for sexual assault. Relying upon courts to read in a

101 See e.g. *Bill C-49*, *supra* note 2, Preamble.

102 See Plaxton, *supra* note 17.

103 See e.g. Stuart, *supra* note 19 at 336.

104 See e.g. Stewart, *supra* note 17.

quasi-objective *mens rea* would risk depriving this important issue of the same careful legislative consideration granted to other changes to the sexual assault regime. Ultimately, if Parliament wishes to criminalize the failure to take reasonable steps to ascertain consent to sexual activity, it should do so explicitly.